CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF MISSOURI.

MAY TERM, 1876, AT ST. JOSEPH.

STATE OF MISSOURI TO USE OF CARROLL COUNTY, Respondent, *vs.* JAMES W. ROBERTS, *et al.*, Appellants.

1. *County Courts—Sheriffs, settlements with—Conclusiveness of.*—County courts in settling with sheriffs act only as the fiscal agents of the county, and such settlements are not conclusive, but are open to the correction of any mistakes. (Marion Co. vs. Phillips, 45 Mo., 75.)
2. *Evidence—Sheriffs, suit on bonds of—Settlements—Confusion.*—A sheriff was authorized to sell county swamp lands, and was authorized to take in payment cash, notes for deferred payments, and the county railroad bonds. In the synopsis of his settlement made from the accounts kept by the clerk of the county court, he was apparently charged with a gross sum for everything received, without distinguishing between the cash notes or bonds. *Held,* that with no other evidence than that synopsis, no judgment could be rendered against the defendants in a suit on the sheriff's bond.

Appeal from Carroll Circuit Court.

Hale & Eads, for Appellants.

I. There is no means of determining, by the settlements, whether the balance claimed is on account of cash collections, notes required to be taken for deferred payments or Carroll county railroad bonds, which he was authorized to take.

CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF MISSOURI.

MAY TERM, 1876, AT ST. JOSEPH.

STATE OF MISSOURI TO USE OF CARROLL COUNTY, Respondent, *vs.* JAMES W. ROBERTS, *et al.*, Appellants.

1. *County Courts—Sheriffs, settlements with—Conclusiveness of.*—County courts in settling with sheriffs act only as the fiscal agents of the county, and such settlements are not conclusive, but are open to the correction of any mistakes. (Marion Co. vs. Phillips, 45 Mo., 75.)
2. *Evidence—Sheriffs, suit on bonds of—Settlements—Confusion.*—A sheriff was authorized to sell county swamp lands, and was authorized to take in payment cash, notes for deferred payments, and the county railroad bonds. In the synopsis of his settlement made from the accounts kept by the clerk of the county court, he was apparently charged with a gross sum for everything received, without distinguishing between the cash notes or bonds. *Held,* that with no other evidence than that synopsis, no judgment could be rendered against the defendants in a suit on the sheriff's bond.

Appeal from Carroll Circuit Court.

Hale & Eads, for Appellants.

I. There is no means of determining, by the settlements, whether the balance claimed is on account of cash collections, notes required to be taken for deferred payments or Carroll county railroad bonds, which he was authorized to take.

Ray & Ray, for Respondent.

I. The settlement shows the amount in the sheriff's hands from that source, and it shows it to be in money.

II. That settlement is a record and imports absolute verity.

SHERWOOD, Judge, delivered the opinion of the court.

Action for breach of sheriff's bond. Breach assigned was the failure by the sheriff to pay to the county certain monies arising from the sale of swamp lands, sold by him in his official capacity. In support of the claim of the plaintiff, the "final settlement," as it is termed, made by the sheriff with the county court, was used as evidence.

It has been claimed here on behalf of the plaintiff, that this settlement, being a record of the county court, imports absolute verity, speaks for itself, and is not open to explanation or contradiction by parol. With respect to this we think otherwise.

This point was passed upon in Marion Co. vs. Phillips (45 Mo., 75), where it was held that the judges of the county court, in cases of this sort, act merely as the fiscal agents of the county; that their action is not final, is not conclusive, is not, in short, *res adjudicata*, but is open to the correction of any mistakes which may occur in the course of the settlement thus made. And such settlements were regarded by the court, in that instance, as occupying substantially the same footing as do settlements between private individuals. In the case at bar, however, the testimony of the clerk and the deputy clerk was based for the most part on record entries, also being orders under which Roberts acted in making sale of the swamp lands of the county.

This testimony was received without objection, and showed that the settlement offered in evidence was a mere synopsis or abstract of the settlement really made; that Roberts filed no written statement of his account with the county; that the settlement as made was made from accounts in the possession

of the county court, kept by their clerk; that Roberts was charged with the gross amount of each sale of swamp lands, including as well the notes for the unpaid purchase money due from purchasers, as the twenty per cent. cash he was required to collect from them; that his accounts so kept, and the settlement offered in evidence, did not show whether the balance, therein specified to be due, was due to the county, on account of cash collected at said sales, or on account of notes required to be taken from the purchasers for deferred payments, or whether the deficiency was on account of Carroll county railroad bonds, which Roberts was authorized to take from the purchasers in payment for the lands sold; and that there was now no means of ascertaining to which class of accounts said balance belonged.

Under these circumstances the court should not have rendered judgment for said balance, viz, $1,600; and it is impossible for this judgment to stand, without utterly disregarding rudimentary principles of evidence.

The sheriff and his sureties are sued for his failure to pay over money which he had collected, and the evidence offered would apply with equal propriety to an action for failure to deliver notes which he had taken for swamp lands sold, or for failure to account for railroad bonds which he had received.

The horn-books of the profession announce the doctrine, "that the evidence must correspond with the allegations, and be confined to the point in issue."

This well established rule was tacitly ignored by the trial court, and, in consequence, its judgment must be reversed, and the cause remanded. All the other judges concur, except Judge Vories, who is absent.

AZEL F. SUMMERVILLE, Respondent, *vs.* THE HANNIBAL AND ST. JOSEPH RAILROAD COMPANY, Appellant.

1. *Agent—Authority of, how proved—Adoption of acts.*—Where a person has recognized another as his agent, by adopting and ratifying his acts done in that capacity, he will not be permitted to deny the relation to the injury of third persons, who have dealt with him as such.

Appeal from Livingston Circuit Court.

James Carr, for Appellant.

John M. Vories, for Respondent.

The authority of the agent of a corporation may be implied from the adoption or recognition of acts by the corporation. (Kiley vs. Forsee, 57 Mo., 390; Southgate vs. A. & P. R. R., 61 Mo., 89.)

WAGNER, Judge, delivered the opinion of the court.

This was a suit for specific performance, and the only question in the case is, whether the purchase money for the land bought by the plaintiff was ever paid to the defendant.

This question was submitted to a jury, under an issue framed by the court; and they found for the plaintiff. The court adopted the verdict, and rendered a decree in his favor. As this was an equitable proceeding, we pay no attention to the instructions.

It seems that the plaintiff paid the purchase money in full to one Merriweather, who was the land agent for the defendant at Chillicothe, and whether he was authorized to receive the money, and whether his receiving it bound the defendant, is the only issue presented.

Plaintiff introduced a receipt, dated at Chillicothe, April 6th, 1870, in these words: "Received from A. F. Summerville four hundred fifty 15–100 dollars, which — agree to deliver for him to the express company, to be sent to the land office of the Hannibal and St. Jo. Railroad Company, in Hannibal, to contract No. 3978 of Sec. —, Tw. — R., as per application. (Signed). C. M. MERRIWEATHER."

Plaintiff also introduced a letter from the treasurer of defendant to Merriweather, acknowledging a remittance of money from him, and returning twenty-five cents, which was said to be counterfeit; also blanks from the land department to Merriweather, giving instructions in reference to making cash remittances. An additional letter from the land department of the defendant was given in evidence, stating to Merriweather, that there was a balance due on plaintiff's contract, and making inquiry about it, and reminding him that the contract was liable to forfeiture. A further letter from the same source was introduced, making inquiry of the agent in regard to several different contracts and what amount the purchasers owed.

A notice from the defendant was then read in evidence, which was signed and promulgated subsequent to the payment of the money, and the transactions hereinbefore alluded to, notifying the public that Merriweather had ceased from a certain date to be agent for the company, and till the appointment of a new agent at Chillicothe, all business would be transacted at the Hannibal office. To the introduction of all the foregoing testimony defendant objected; but the court overruled the objection and admitted it.

Plaintiff then proved the payment of the purchase money in full to Merriweather, and proved further by several witnesses that they had paid money to Merriweather for the purchase of land, and that the company had received it and sent their deeds through him.

Defendant offered a witness connected with the land department of the company, who testified that Merriweather was a mere agent to sell lands, but had no authority to receive the money in payment for them.

The most numerous class of cases of agency is that which relates to affairs, where the agency is proved by inference from the habit and course of dealing between the parties. The extent of the authority conferred on the agent is ordinarily known and ascertained only by implication from the recognition, or conduct, or acquiescence of the principal. And

where the principal has recognized another as his agent by adopting and ratifying his acts done in that capacity, he will not be permitted to deny the relation to the injury of third persons, who have dealt with him as such.

The evidence, submitted and objected to, was admissible to show how the company treated and regarded Merriweather as its agent, and its acquiescence in, and ratification of, his acts. It showed, that he was consulted about contracts; that money was received by him, and that instructions were given to him in relation to its transmission. Other and independent evidence showed, that in numerous instances money was paid to him on these land contracts, and that the company received it and forwarded back the deeds through him. This was not only a ratification and acquiescence in his acts, but it was holding him out as possessing authority to receive the money.

A point has been raised by counsel, that the receipt only showed an undertaking to transmit the money to Hannibal to the defendant. But we think there is nothing in it. The receipt used was a printed blank, and the evidence is, that the money was paid to Merriweather, as agent, and that he received it as such, and the defendant must be held bound by his acts.

Judgment affirmed. All the judges concur, except Judge Vories, who is absent.

STATE OF MISSOURI, Appellant, *vs.* THOMAS J. FLINT, Respondent.

1. *Practice, criminal—Indictment—Sheriff—Embezzlement—Money and ownership, how stated—Statute, construction of.*—In an indictment against a sheriff for embezzling public money of the State and county, it is not necessary to state from whom he received the money, nor the proportion that belonged respectively to the State and county (Wagn. Stat., [1872] 459, § 41.) All that is said in the indictment, in regard to the ownership of the money, must be considered as mere amplifications of the words "public moneys," and their

significance is to denote the kind of money that may be the subject of embezzlement and not its ownership. It is sufficient to allege that it was public money belonging to the State or county or both.

2. *Practice, criminal—Indictment—Allegations, conjunctive or disjunctive—Repugnancy.*—When a statute enumerates the offenses, or the intent necessary to constitute the offense, disjunctively, the indictment must charge them conjunctively, when the acts are not repugnant. If the contradictory or repugnant expressions do not enter into the substance of the offense, and the indictment would be good without them, they may be rejected as surplusage, or if simply inconsistent with a preceding averment, it may also be so rejected.

3. *Practice, criminal—Indictment—Repugnancy, when fatal.*—The charge in the indictment must not be inconsistent with itself, but no absolute rules can be laid down to determine what repugnancy will be fatal.

4. *Practice, criminal—Indictment—Court—Public moneys—Secreting—Investing—Statute, construction of.*—A charge of secreting and making away with public moneys is inconsistent with a charge of investing it in property in the sense of the statute (Wagn. Stat., [1872] 459, § 41,) and, if it is intended to arraign the accused on each, they must be inserted in different counts.

5. *Practice, criminal—Indictment—Embezzlement—Agent of State, how alleged—Statute, construction of.*—An indictment against an agent of the State and county, for embezzlement of public funds (Wagn. Stat., [1872] 459, § 41), should allege when and how he was appointed and the authority for his appointment.

Appeal from Harrison Circuit Court.

J. A. Hockaday, Att'y Gen'l, for Appellant.

I. The first count of the indictment covers the statutory offense and is therefore sufficient. (Wagn. Stat., 459, § 41.) It is not necessary to state more definitely the money embezzled. (Whart. Crim. L. [7 Ed.] § 1941; 2 Bish. Crim. P., 325.) Nor is it necessary to state how much belonging to the State and county, each, was embezzled. The substance of the offense is the embezzlement of public money. (Brown vs. State, 18 Ohio St., 506.)

II. Where a statute enumerates offenses disjunctively, the indictment must charge them conjunctively, unless the acts are repugnant. (30 Mo., 241; 44 Mo., 343.)

For the same reason the indictment is good where it avers that he converted the money to his own use, used it by way of investment in property and merchandise, that he made away with the same and secreted, etc.

III. It is not necessary to aver how the defendant became agent of the State and county. (Arch. Crim. Prac. and forms, 562.) The same rule should apply to an agent of State or county as to that of corporations or individuals in ordinary cases of embezzlement and conversion.

IV. Nor is it necessary to state with more particularity how defendant became possessed of the money as said agent, nor by whom the money was intrusted. (Whart. Crim. L., § 1941.)

V. The other objections to this count are that the allegations are inconsistent and repugnant, and that the indictment is too general to inform the accused of the crime alleged against him. As to the first point, see 30 Mo., 241; and there is no force in the latter point, as all the elements of the offense are embraced in the indictment.

Shanklin, Low & McDougal, for Respondent.

I. The crime charged is a felony under our statute, and the indictment should be sufficiently definite to put the accused in possession of the charge for which he is held to answer. (State vs. Rockford, 52 Mo., 199; State vs. Bonnell, 46 Mo., 395; State vs. Evers, 49 Mo., 542; State vs. Bittinger, 55 Mo., 601; State vs. Heine, 50 Mo., 362; State vs. Albin, 50 Mo., 419; State vs. Gardner, 2 Mo., 24.)

An indictment for embezzlement, so general as to afford no information to the prisoner of the precise sums embezzled or of the persons from whom they were received, has been held insufficient by the English courts. (Rex vs. Hodgson, 3 C. & P., 422; Rex vs. Bootyman, 5 C. & P., 300; 2 Arch. Cr. Pr., [7 ed.] 562.) The indictment must go beyond the words of the statute, and state what money or thing was embezzled, and, how, or from whom, it came into the hands or possession or under the control of the officer or agent. (Rex vs. Ferneaux, Russ. & Ry., 335; Rex vs. Flower, 5 B. & C., 736; Com. vs. Simpson, 9 Met., 138; Rex vs. Johnson, 3 M. & S., 539; People vs. Cox, 40 Cal., 275; 2 Bish. Crim. Prac., §§ 285–6 and note 3; Com. vs. Smart, 6 Gray, 15; 2 Arch. Crim. Prac. & Pl., 448, and note; 2 Bish. Cr. Pr., § 285.)

II. It does not appear from the second count, how defendant became the agent of the State or county. (2 Arch. Crim. Pr. & Pl.. [7 ed.] p. 562; Whart., Crim. L., [7 Ed.] §§ 1940, 41.) This count contains several distinct offenses.

WAGNER, Judge, delivered the opinion of the court.

The defendant, who was sheriff and collector of Daviess county, was indicted for embezzlement under the statute, (Wagn. Stat. [Ed. 1872], 459, § 14) for converting, secreting and investing certain moneys, which were alleged to have belonged to the State and county. The indictment contained two counts, and the first count, after alleging the election and qualification of the defendant as sheriff and collector, charged that as such sheriff and collector, he feloniously converted to his own use, and used by way of investment in merchandise and property, and made way with and secreted, large sums, or portions of the public moneys belonging to the State and county revenues, by him received as sheriff and collector for safe keeping, disbursement, transfer and other purposes, amounting in the aggregate to the sum of ten thousand dollars.

The second count charged, that the defendant was agent of the State and of the county, and as such agent he had in his possession and under his control and supervision, by virtue of his agency, a large amount of the public moneys belonging to the State and county, and, at certain periods stated, he feloniously converted to his own use, by way of investment in property and merchandise, and made way with and secreted certain sums specified. The latter charge was repeated as occurring at divers times to the jurors unknown.

There was a motion made to quash both counts. The reasons assigned for quashing the first count, were: 1st. That the money charged to have been embezzled was alleged to be the aggregate of ten thousand dollars, and was charged to have been both of the State and county revenue; 2nd. that it was alleged that the defendant received the

money for safekeeping, for disbursement, for transfer and for other purposes, by virtue of his office; but the indictment failed to state, whether he received it for the one purpose or the other; 3rd. that it was alleged, that defendant converted the money in its aggregate amount to his own use, that he used the same money by way of investment in property and also in merchandise; that he made way with the same money, and also secreted it, which allegations were inconsistent and repugnant and could not all be true.

The objections assigned to the second count, were; 1st. That it did not appear how the defendant became the agent of the State and county, by whom or by what authority he was appointed such agent, nor for what purpose he was so appointed; 2nd. it did not appear how defendant became possessed of the money as agent of the State or county, nor by whom any money of the State or county was entrusted to him; 3rd. that the allegations were inconsistent and repugnant; and 4th, that the charges were so general as to afford no information to the accused of the precise money he was alleged to have embezzled, or from whom he received it, or how he came to have the same in his possession.

The court sustained the motion and quashed both counts, and the State appealed.

The following is the section of the statute upon which the indictment was drawn: "If any officer appointed or elected by virtue of the Constitution of the State, or any law thereof, including as well all officers, agents and servants of incorporated cities and towns, as of the State and counties thereof, shall convert to his own use, in any way whatever, or shall use by way of investment in any kind of property or merchandise, or shall make way with, or secrete, any portion of the public moneys, or any valuable security by him received for safekeeping, disbursement, transfer, or for any other purpose, or which may be in his possession, or over which he may have the supervision, care or control, by virtue of his office, agency or service, every such officer, agent or servant, shall upon conviction be punished," etc.

This section was before this court in the case of State vs. Clarkson (59 Mo., 149), where it was said, that the first clause of the section described the ordinary elements of the offense of embezzlement, which was followed by certain alternative provisions, which being committed would also constitute that crime. The section applies the law to a new class of persons, and declares that if they convert to their own use, in any manner whatever, the moneys or securities there spoken of, they shall be guilty. When they have made the illegal or unlawful conversions, the elements of the offense are complete, regardless of the means they have used to accomplish their object. But a new and distinct element or ingredient is introduced. If the officer, agent or servant, having the supervision, care or control of the money or security, shall use the same by way of investment in any kind of property or merchandise, or shall make way with or secrete the same, he is also made guilty of the offense. Here the pleader distinctly charges the conversion, and attempts to go on and specify how it was done, so as to bring the offense within the second or alternative clause of the section.

We do not think there is any valid objection to the indictment on account of its failure to state from whom defendant received the money, or to point out what particular money he embezzled, or whether it was State or county revenue, or how much belonged to either. It is charged that he converted to his own use, while he was in office as sheriff and collector, large sums of money received by him as such, belonging to the State and county revenue, and that was sufficient. It would be a difficult task to undertake to set forth or specify from whom the collector received the money in making his collections, nor does the statute contemplate it.

Nor is it necessary to state what particular money was embezzled or the proportion that belonged to the State or county. The statute makes it a crime to convert by the means spoken of "any portions of the public moneys." The substance of the offense, as defined by the statute, consists in converting the "public money," and all that is said as regards the

ownership of the money must be considered as mere amplifications of the words "public moneys." They are simply specifications as to what is and what is not public money. Their significance is to denote the kind of money that may be the subject of embezzlement and not its ownership. (Brown vs. The State of Ohio, 18 Ohio St., 496.)

It is sufficient, under the statute, for the indictment to allege that the money was public money belonging to the State or county, or to both. Certain undivided portions of the money belonging to the State and county each; and there is nothing to show that it was the intention of the legislature to have the several amounts ascertained and specified in the indictment. It is only necessary for the indictment to show that it was public money in the statutory sense, that is, that it was public money belonging to the State or county.

The statute is in the disjunctive, and makes the act criminal when done in one or the other of different ways. The indictment follows the language of the statute, but charges the offense to have been committed conjunctively. This ordinarily is correct and proper pleading. Where a statute on which an indictment is founded, enumerates the offenses or the intent necessary to constitute such offenses disjunctively, the indictment must charge them conjunctively where the acts are not repugnant. (State vs. Fitzsimmons, 30 Mo., 326.) Where the contradictory or repugnant expressions do not enter into the substance of the offense, and the indictment will be good without them, they may be rejected as surplusage; or, where the repugnant matter is simply inconsistent with any preceding averment, it may also be rejected as superfluous.

It is not easy to lay down any absolute rules, which can be taken as reliable guides to determine what repugnancy will be fatal and what will not. It is said by Chitty, that "it is essential that the charge should not be repugnant or inconsistent with itself, for the law will not admit of absurdity and contradiction in legal proceedings." (1 Chit. Crim L., 231.)

The indictment alleges, that defendant "did convert to his own use by way of investment in property and merchandise, and make way with and secrete" the public money. The offense consists in investing the money in property or merchandise, or in making way with and secreting the same. Both of these cannot be done with the same money. It is physically impossible. If the money was invested in property or merchandise, it could not be made way with or secreted in the sense of the statute. The defendant should have been informed upon which of these substantive charges he was called upon to answer. They constituted distinct acts and separate modes of committing the offense, and, if it was intended to arraign the accused on each, they should have been inserted in different counts. For this reason the first count was manifestly bad.

The same argument will apply to the second count; and we think it was objectionable also on account of its defective allegations of agency. It merely stated that the defendant was the agent of the State and county. It should have alleged when and how he was appointed and the authority for his appointment.

It follows therefore that the judgment of the court below must be affirmed. All the judges concur, except Judge Vories, who is absent.

———o———

JOHN H. GROFF, Respondent, *vs.* ROBERT N. BELCHE, Appellant.

1. *Sale of personal property—Oats to be threshed and measured—Delivery—When title passed—Confusion of goods—Replevin.*—Oats were purchased and paid for, which were then in stacks, but were to be threshed and measured by the vendor, and then and there delivered to the purchaser, who was to furnish sacks for them, and if he did not furnish enough sacks the balance were to be stored by the vendor. *Held*, that the title passed when the oats were threshed and measured, and the fact that the vendor mixed the oats, for which no sacks were provided, with his own oats, did not divest the title of the purchaser, but that he might have maintained replevin therefor.

Appeal from Grundy Circuit Court.

Stephen Peery, with Shanklin, Low & McDougal, for Appellant.

Geo. Hall & Daniel Metcalf, for Respondent.

HOUGH, Judge, delivered the opinion of the court.

This was an action to recover damages for the alleged breach of a contract for the sale of one thousand bushels of oats. The plaintiff bought of the defendant one thousand bushels of merchantable oats, and paid for the same before delivery. At the date of the purchase, the oats were in stacks and ricks, and, by the terms of the contract, they were to be threshed out by the defendant, measured at the machine when threshed, and then delivered to the plaintiff. The plaintiff agreed to furnish sacks for the oats as they were threshed, but in the event he should fail to furnish sacks enough for the entire amount purchased, the residue, for which no sacks should be furnished, was to be stored in pens by the defendant, in good condition. The oats were threshed in two parcels. Between eight and nine hundred bushels were threshed at one place, on the defendant's plantation, and afterwards some three hundred and seventy bushels were threshed at another place. The plaintiff furnished sacks for five hundred bushels only of the first lot, and the remainder was put in pens, which he afterwards took away; no complaint was made as to the quality of this lot. When the second lot was threshed, the plaintiff failed to furnish any sacks, and his portion was put up in the same pen with the oats belonging to the defendant, and remained there for some weeks. The oats were in good condition, and met the requirements of the contract, when stored, though nothing is said as to the manner in which they were secured in the pens.

The entire transaction was in February or March. Certain persons, acting for the plaintiff, afterwards took from the pen, containing the three hundred and seventy bushels, the plaintiff's share thereof, rejecting some which were wet and injured,

and frozen in lumps, put them into sacks, and delivered them to plaintiff. These oats were not in good merchantable condition when sacked.

The plaintiff, who had judgment below, proceeded upon the theory, that the title to the oats, for which no sacks were furnished at the time of threshing, never passed to him, until they were taken away by him; that there was no delivery by the defendant to him prior to that time, and as the oats when sacked were not merchantable, the defendant was liable to him in damages for a breach of his contract.

Although the money had been paid, the contract of sale was undoubtedly executory, until the oats were threshed and measured. Such was the intention of the parties. When the oats were threshed and measured, the property in them passed to the plaintiff. They had been paid for; they were at the place of delivery agreed upon; the quantity had been ascertained, and they were of the quality bargained for. That such also was the understanding of the parties, was evidenced by the agreement, that, if not sacked by the plaintiff at the time of threshing, they should be put in pens; a precaution on the part of plaintiff, which would have been wholly unnecessary if the delivery was not to be complete, until he furnished the sacks. The defendant was bound to deliver to him good merchantable oats, and it would have been immaterial to him how he kept them prior to delivery. It is quite clear that they were to be penned as the plaintiff's oats.

Having been threshed and measured, and the plaintiff having failed to furnish the sacks, the defendant, according to the agreement, put them in pens, but mixed them with his own oats.

This intermingling of his own and plaintiff's oats, however, could not have the effect of re-vesting him with the title which his previous acts had transferred to the plaintiff. The plaintiff might have maintained replevin for his portion. (Kaufman vs. Schilling, 58 Mo., 218; Henderson vs. Lauck, 21 Penn. St., 359.) As the title to the oats was in the plaintiff at the time they were stored, and as it continued in him,

notwithstanding they were mingled with the defendant's oats, in the absence of any evidence of negligence on the part of the defendant in securing them against the weather in the pen, the plaintiff must bear any loss resulting from natural causes after they were so stored.

The point made about the acceptance of the oats by the persons, who took them away for the plaintiff, requires no consideration at our hands. As the second and third instructions given for the plaintiff, and the second instruction given for the defendant, are not in harmony with the view of the case here taken, the judgment will be reversed and the cause remanded. The other judges concur, except Judge Vories, who is absent.

FOWLER & WILD, Respondents, *vs.* MASTON J. WILLIAMS, Appellant.

1. *Practice, civil—Pleadings—Suit by firm name—When objection should be made.*—After judgment it is too late to object that plaintiffs brought suit in their firm name; if advantage is sought therefrom, it should be made by suitable motion before the trial is closed.

Qære, whether a judgment could be sustained against a firm where the individual names were not set out in the petition.

Appeal from Livingston Circuit Court.

Davis & Wait, for Appellant.

I. The judgment is irregular, and the motion in arrest should have been sustained. (Revis vs. Lamme & Bro., 2 Mo., 207; Rohrbough & Co. vs. Reed Bros., 57 Mo., 293.)

H. M. Pollard, for Respondents.

I. The defendant could only have taken advantage of the error by plea in abatement. (Hawley vs. Blanton, 1 Mo., 49; Boise vs. Langham, 1 Mo., 572; Thompson vs. Elliot, 5 Mo., 118.)

WAGNER, Judge, delivered the opinion of the court.

Plaintiffs, by their firm name, commenced an action against the defendant before a justice of the peace.

In the justice's court the parties appeared, and after the evidence was heard, a verdict was rendered for the defendant. Plaintiffs then paid the costs and took an appeal to the circuit court. In the latter court both parties appeared, and by mutual consent and agreement the case was referred. The referee took the testimony and reported in favor of the plaintiffs. No exceptions were taken to the report, and it was confirmed and judgment rendered thereon. Defendant then moved in arrest of judgment, on the sole ground that the plaintiff's individual names were not set out.

The court overruled the motion in arrest, and that is the only point disclosed by the record. An action, to be properly brought, should be commenced in the christian and surnames of the parties. But where the declaration is in the name of a firm, if advantage is sought to be taken of the defect, it should be done by a suitable motion before the trial is closed, so as to give the parties an opportunity to amend. If no such motion is made, and the cause proceeds to judgment, the judgment will not be void, but will be good after verdict.

Whether a judgment could be sustained against a firm, where the individual names were not inserted in the petition, is another and very different question, which we are not called upon to consider.

Parties ought not to be encouraged in taking their chances in legal proceedings, and in inducing the court and the opposite party to believe that they have waived mere irregularities, and then, when they are defeated, rely upon them as a last resort.

The judgment should be affirmed. All the other judges concur, except Judge Vories, who is absent.

Benjamin P. Williamson, Respondent, *vs.* Jeremiah Hall, Appellant.

1. *Conveyances, construction of—Incumbrances, covenant against—"Those under whom they claim"—"All claiming under him."*—A covenant in a deed by the grantors, that the land is free from all incumbrances, done or suffered by "those under whom they claim," refer to those from whom they derive title, while a similar covenant against the acts of "all claiming under him" would probably be construed to have a different signification, and would not be held to include a vendee of the entire estate of the grantor.
2. *Conveyances—Incumbrances, covenant against—Knowledge of, effect of.*—A knowledge of the existence of the incumbrance by the covenantee at the time the covenant is entered into, will not relieve the covenantor from his liability on the covenant.
3. *Damages—Incumbrances, covenant against—How measured.*—Where the incumbrance on land is a railroad passing over it, the damages for this breach of the covenant against incumbrances are the value of the land as increased or diminished by special damages or benefits resulting therefrom.
4. *Conveyance—Construction of—"More or less."*—The words "mor e or less" when used in a deed in connection with a description of land by the sectional sub-divisions, or by metes and bounds, are used to designate approximately the quantity of land in such sub-division or defined boundaries, and do not refer to the state of the title to such land.

Appeal from Andrew Circuit Court.

William Heren, for Appellant.

The damages can only be the value of the easement.

W. W. Caldwell, with Wm. S. Greenlee, for Respondent.

I. The fact of the incumbrance being known to the purchaser will be no bar to his recovery upon it. (Rawle Cov., 123, 124; Kellogg vs. Malin, 50 Mo., 500, and cases cited; Beach vs. Miller, 51 Ills., 206, and cases cited.)

II. The true rule of compensation in this case is the damage resulting to the estate in its market value from the incumbrance (this is such an incumbrance as the plaintiff or defendant cannot remove). (Wetherby vs. Bennett, 2 Allen, 428; Woodby vs. Ludby, 14 Allen 1.) A just compensation for real injury resulting from continuance of incumbrance. (Harlin vs. Thomas, 15 Pick., 66; Batchellor vs. Storgis, 3 Cush., 201; Hubbard vs. Norton, 16 Comst., 432; 16 Ind., 338.)

HOUGH, Judge, delivered the opinion of the court.

On the 27th day of August, 1873, the defendant sold and conveyed to the plaintiff, in fee, "all the north-east quarter of the south-east quarter, of section No. three, Township, No. sixty-one, Range No. thirty-five, forty acres, more or less." The deed, which was executed by the defendant and his wife, contained, among others, an express covenant, "that the said premises are free and clear of any incumbrances done or suffered by them or those under whom they claim." On the 25th day of November, 1867, Thomas Vaughan, from whom the defendant acquired title, relinquished to the Missouri Valley Railroad Company, its successors and assigns, a right of way for a railroad fifty feet in width over the tract above described, which has ever since been used by said company and its successors for railroad purposes.

The present suit was brought to recover damages for the breach of the covenant against incumbrances, occasioned by the existence of the right of way in the Railroad Company. There was a verdict and judgment for the plaintiff, from which the defendant has appealed.

It is conceded, that the language of the covenant covered the acts of Vaughan. The defendant acquired Vaughan's entire estate in the land, and his deed to the plaintiff conveys the fee; it is clear that the words "those under whom they claim" refer to those from whom they derive title. They can have no other application. In a covenant against incumbrances done or suffered by the grantor, and all claiming under him, the words "all claiming under him" might and probably would be construed to have a different signification, and would not be held to include a vendee of the entire estate of the grantor.

The plaintiff knew of the construction and operation of the railroad over the land at the time he purchased, though it is uncertain from the testimony, whether he knew that the railroad was rightfully there. The defendant sought to avail himself of the plaintiff's knowledge as a defense, but it has been repeatedly, and we think properly, decided, that knowl-

edge on the part of the grantee of the existence of the incumbrance, at the time the covenant is entered into, will not relieve the covenantor from his liability on the covenant.

In the instructions defining the measure of damages, the court directed the jury in substance to ascertain the amount of the injury resulting to the plaintiff from the existence of the easement in the Railroad Company, excluding from their consideration all benefits or damages which were common to other lands in the vicinity not occupied by said railroad.

The phraseology employed in these instructions differs from that used in an instruction, which received the sanction of this court in Kellogg vs. Malin, *post* p. 429, but in that case no damages or benefits were shown, except such as were common to other lands, and the value of the land with interest was esteemed to be the true measure of damages in that case. Here there was testimony of special injury and special benefits.

The result reached is practically the same in both cases.

The covenant being one of indemnity, the object, in each case, should be to ascertain the amount of the loss suffered in consequence of the existence of the incumbrance. In cases like the present the value of the land with interest, as increased or diminished by special damages or benefits, will accurately measure the injury resulting from the incumbrance.

The instructions given presented the case fairly to the jury.

Another point relied upon by the defendant is, that as the plaintiff knew a part of the land was occupied by the railroad, the words "more or less," used in connection with the quantity of land designated in the defendant's deed, qualified his covenant against incumbrances, and the land occupied by the railroad under its easement must therefore be held to have been excepted from such covenant.

These words have been frequently construed in this country and in England, and when used in connection with a description of land by the sectional subdivisions established and used in many portions of this country, or by metes and bounds, they

are intended simply to designate, approximately, the quantity of land in such sub-divisions, or defined boundaries, and do not refer to the state of title to such land. The entire quantity of land contained in the north-east quarter of the south-east quarter, whether more or less than forty acres, was conveyed by the defendant to the plaintiff, and the defendant covenanted that no part of that land was in any way incumbered, either by himself, or those under whom he claimed.

We are of the opinion therefore that the judgment should be affirmed. Judges Napton and Sherwood concur; Judges Wagner and Vories absent.

———o———

ISAAC WYATT, Appellant, *vs.* THE CITIZENS RAILWAY COMPANY, Respondent.

1. *Practice, civil—Trials—Jury, province of—Supreme Court.*—It is the province of the jury to determine the facts from the evidence, and of the Supreme Court to see that the instructions submitted the facts fairly to the jury.
2. *Practice, civil–Trials-Instructions–Plaintiff's condition–Contributory negligence*—In suit for damages sustained in stepping off a car, the plaintiff then suffering from a prior injury, an instruction to find for the plaintiff if the jury find that the conductor refused to stop the car where asked, and that the plaintiff carefully, and without negligence, stepped off, is erroneous, because the plaintiff's condition at the time is ignored, and the contributory negligence is left to the jury to find as a matter of fact, without any explanation of what would, on the evidence, constitute such contributory negligence. And an instruction to the jury, that if satisfied the car was moving faster than usual when the plaintiff got off, and that plaintiff knew the risk and danger, and was not influenced by the remark of the conductor to jump, this was evidence of a want of care, was objectionable, in not referring to plaintiff's wound, and in not directing the attention of the jury to facts, which, if satisfactorily proved, would, in the estimation of the court, constitute negligence; but it simply declares certain facts evidence of negligence, when the facts did not of themselves constitute negligence.

Appeal from Buchanan Circuit Court.

Jas. H. Ringo, for Appellant, cited Wyatt vs. Citizen's R. R. Co., 55 Mo., 485; McIntyre vs. Cent. R. R. Co., 37 N. Y., 287; 49 Id., 47; Fiber vs. Same, 59 Id., 351; Morri-

son vs. Erie R. R. Co., 56 N. Y., 304; Penn. R. R. Co. vs. Kilgore, 32 Penn. St., 292; Same vs. McKloskey's Adm'r, 23 Id., 526; Foy vs. London B. & So. C. R. R. Co., 18 Com. Ben. [N. S.], 225; Siner vs. G. W. R. R. Co., L. R., 3 Exch., 150; S. C., 17 W. R., 417; Lambeth, Adm'r, vs. North Car. R. R. Co., 8 Am., 509; Shear. & Redf. Negl. Chs., 15, 27; Chicago & Alton R. R. Co. vs. Pondrom, 2 Am., 309; Gal. & C. U. R. R. Co. vs. Jacobs, 20 Ill., 478; Chic. & R. I. R. R. vs. Still, 19 Id., 499; St. Louis & Al. R. R. vs. Todd, 36 Id., 409; Chic. & Al. R. R. vs. Hogarth, 38 Id., 370; Huelsenkamp vs. Cit. R. W. Co., 37 Mo., 552; Morissey vs. Wiggins Ferry Co., 43 Id., 383; S. C., 47 Id., 523; O'Flaherty vs. Union R. R. Co., 45 Id., 71; Brown vs. H. & St. J. R. R. Co., 50 Id., 464; Kerwhacker vs. C., C. & C. R. R. Co., 3 Ohio St., 172; Redf. Rail., vol. 2, 4 ed., pp. 225 231, 236; 24 Vt., 487; 13 Ga., 86; 18 Ga., 679; 24 Ga., 75; 2 Roceworth, 374; 9 Allen, 557; 16 Conn., 421; 19 Id., 507; 19 Ga., 440, 437; 4 Bing., 628; 1 Dutcher [N. J.], 556.

Allen H. Vories, for Respondent, cited Huelsenkamp vs. Citizens R. R. Co., 37 Mo., 537; Morrissey vs. Wiggins Ferry Co., 43 Mo., 380; Karle vs. K. C., St. Jo. & C. B. R. R. Co. 55 Mo., 476; Whalen vs. St. L., K. C., & N. R. R. Co., 60 Mo., 323; Wyatt vs. Cit. R. W. Co., 55 Mo., 491, and cases referred to; Beattie vs. Hill, 60 Mo., 72.

Napton, Judge, delivered the opinion of the court.

This case is here on an appeal from the second trial in the circuit court, which resulted, as the first trial did, in a verdict for the defendant. The history of the first trial is reported in 55 Mo., 485. The report of the second trial contains a statement of all the evidence, and this more clearly shows the important disputed facts, and consequently the applicability of the instructions given to the jury.

It appears that the plaintiff's son, whose injury this action was brought to redress, had, previous to his fall in stepping from the street car, cut his knee with a hatchet, and that medical advice and aid had been received in regard to this wound.

What length of time had elapsed between the accidental wound from a hatchet and the occurrence of the injury complained of, is variously stated by the witnesses from two to seven weeks, and to what extent the hatchet wound impaired the young man's health and activity, is also the subject of the most contradictory and irreconcilable testimony. On the one hand, it was stated that the hatchet wound occurred only two or three weeks before the accident on the car; that young Wyatt was confined to his bed for eight or ten days by the cut, and, when able to leave his room, used crutches; and in fact, was using a cane at the time the alleged injury, in jumping from the car, occurred. On the other hand, it is testified to, that this wound by a hatchet occurred seven weeks before the street car accident; that it was a trivial hurt, and never deterred the young man a single day from his usual occupations; that he never used crutches until after the amputation of his leg, and never used a cane or stick for a support, and that the wound was entirely healed when he ventured on stepping from the car.

It is evident that the condition of this hatchet wound constituted a very material element in arriving at a conclusion as to the prudence of the young man's movements in jumping from the street car.

Another circumstance, having a material bearing on the case, was the alleged conversation between young Wyatt and the conductor, and the testimony on this point is fully as contradictory as it is in regard to the wound from the hatchet. The young man himself testifies, that he asked the conductor three several times to stop the car at the street crossing where he desired to get off; that the conductor not only refused to stop the car, but told him, if he insisted on getting off, to jump off. On the other hand, the conductor stated on the trial, that he was never asked to stop the car, and did not observe young Wyatt's fall when he stepped off. Another witness, who got on the car with Wyatt, and got off at the same place, and about the same time, states that no request was made to the conductor, and no bell rung.

It was for the jury to determine these facts from this irreconcilable evidence, and it is only our province to see that the instructions submitted the facts fairly to the jury.

The instructions given for the plaintiff are not objected to. It is insisted, however, that the refusal of the court to give the second one asked by the plaintiff was error; but that instruction directed the jury to find for plaintiff, if they found that the conductor refused to stop the car, when asked, and that young Wyatt carefully, and without negligence, stepped off. The condition of the young man's knee at the time is wholly ignored, and the contributory negligence is simply left to the jury to find as a matter of fact, without any explanation from the court of what would, on the evidence, constitute such contributory negligence.

The sixth instruction given for the defendant directs the jury, that if satisfied that the car was moving faster than usual when Wyatt got off, and that Wyatt knew the risk and danger, and was not influenced by the remark of the conductor "to jump," this was evidence of want of care.

This instruction is objectionable. It does not refer to Wyatt's wound, nor direct the attention of the jury to the facts, which, if satisfactorily proved, would, in the estimation of the court, constitute negligence; but simply declares certain facts evidence of negligence, and those facts do not of themselves constitute negligence. Wyatt's knowledge of the risk could not be ascertained, but the continued lameness or disability arising from a previous wound would be a fact authorizing a jury to infer a want of ordinary prudence on his part. This instruction, therefore, was prejudicial to plaintiff, since the jury might have drawn the inference of Wyatt's knowledge of the risk, or, which is the same thing, his negligence from the single fact of the speed of the street car at the time of the injury, the only fact referred to in the instruction.

The judgment must be reversed, and the cause remanded. The other judges concur.

SETH GAGE. *et al.*, Respondents, *vs.* ELIJAH GATES, Appellant.

1. *Bankruptcy, proceedings in—Dismissal of, effect of—Re-instatement—Bankruptcy act.*—After a dismissal of proceedings in involuntary bankruptcy, a reinstatement of the cause, without further notice or appearance, is absolutely void, and so are all proceedings thereunder. (U. S. Bankr. Act, §§ 39, 40.)
2. *Practice, civil—Agreed case—Special verdict—When will stand.*—In this State an agreed case stands in lieu of a special verdict, and all the facts necessary to a determination of the case must be definitely ascertained. If there be any ambiguity, any omission of facts necessary to a recovery, any lack of clearness and certainty on material points, the judgment will not be allowed to stand.
3. *Husband and wife—Personal property, separate estate in, how reached—Attachment—Equity.*—The separate estate of a wife in personal property cannot be reached by attachment proceedings, but only by appropriate proceedings in equity, and then only when she has created a charge on her separate estate binding thereon.

Appeal from Buchanan Circuit Court.

A. H. Vories, for Appellant.

J. D. Strong, for Respondents.

SHERWOOD, Judge, delivered the opinion of the court.

This cause was tried on an agreed statement of facts, resulting in a judgment for the plaintiffs, and the defendant, who is the sheriff of Buchanan county, has appealed.

The statement referred to is, in substance, this:

Frank T. Hall and Mary Hall, husband and wife, in the year 1872 resided in St. Joseph, Mo., the wife being engaged in the millinery business, and having a stock of goods suited to her vocation. Proceedings were instituted by certain creditors in the district court of the United States for the Western district of Missouri, with the view of having the wife declared and adjudged an involuntary bankrupt. The husband was no party to this procedure. Service of petition and order to show cause were duly had upon the wife; but before any adjudication of the matter was reached, the petitioning creditors dismissed their proceedings, and no seizure or posses-

sion of property by the United States Marshal occurred during their pendency, nor at any time.

After these occurrences, the wife absconded from this State, leaving a large portion of the stock of millinery in the possession of her husband, who, in like manner, absconded, leaving the property in the possession of one Englehardt.

Thereupon, the plaintiffs commenced suits by attachment against the husband and wife, to recover certain sums of money. The ground of the attachment was non-residence, and publication was duly made as to both of the defendants.

The wife was subsequently dismissed as party defendant. By virtue of the writs of attachment issued in the several causes, the then sheriff of Buchanan county levied on and attached the stock of millinery, as well as other personal property. After the levy of these writs, the proceedings in bankruptcy were, without any further process, notice, or order to show cause, re-instated against the wife by order of the district court. This re-instatement of the cause in and by the district court occurred after the wife had absconded from the State, to which she has never returned. The defendant, Gates, is the successor in office of the former sheriff, Richardson, by whom the writs mentioned were levied and afterwards delivered to the present sheriff, together with the attached property. Special judgments were rendered against the husband, and against the property attached in all of the attachment suits. Subsequent to the rendition of these judgments, the wife was adjudged a bankrupt, without any notice, etc., as before stated.

Under special executions issued on the judgments mentioned, the defendant sold the property attached, and all the right, title and interest of the husband therein, realizing from such sale $1,016.69. The circuit court of Buchanan county then ordered the defendant to pay ratably to the attaching creditors the money arising from the sale referred to. The district court also made an order on the sheriff to show cause, why an order should not issue from that court, commanding him to pay to the assignee in bankruptcy of the wife the

proceeds of such sale arising from the stock of millinery; but which order was prior in point of time, is not stated. No order of restraint, injunction, or anything of that nature, was ever issued by the district court, or served on the defendant or the plaintiffs, nor did they have any notice or knowledge of the bankruptcy proceedings against Mrs. Hall before sale took place under the special executions. The sheriff made return to the order of the district court to show cause, etc., that of the proceeds of the sale of the attached property the sum of $661.84 was realized from the stock of millinery, which Mrs. Hall had, while living with her husband and doing business as milliner. Upon this return being made, the district court peremptorily ordered the sheriff to pay to the assignee of Mrs. Hall the sum obtained by selling the stock of millinery. This order was complied with, and the assignee thus became the recipient of the $661.84. The residue of the proceeds of the sale of the property was, it seems, paid by the sheriff in conformity with the order of the circuit court, though this is by no means clear. But as that court only rendered judgment for an amount equal to the sum realized from the sale of the stock of millinery, together with interest on that sum, amounting in the aggregate to $741.26, and as the sum of $661.84 is mentioned in the concluding portion of the agreed statement, as the amount in dispute, we may perhaps not unreasonably infer, that the sheriff did his duty so far as concerned the proceeds of the sale of the property not forming a portion of the millinery establishment.

This record is a very fair specimen of others which are daily presented for our consideration. It would not unnaturally be supposed, that, when attorneys deliberately sit down to draw up an agreed statement of facts, such statement would leave no room for doubt as to the meaning thereof. But that supposition shoots wide of the mark as in the case before us; for portions of this agreed statement (so called) are either contradictory, or else utterly unintelligible. For instance, we are told in relation to the order made by the circuit court for the sheriff to pay to the plaintiff the sums realized

from the attachment sales, that he has not "paid to said plaintiffs said sums of money, nor any part thereof." In another place, in reference to the peremptory order of the district court, requiring the sheriff to pay to the assignee the $661.84, we are gravely informed "that said Gates has paid said last mentioned sum to said Musser, pursuant to said sum to the aforesaid parties plaintiffs in said attachment suits." This is sheer nonsense. It may be, that the original statement was clear enough. If so, counsel have been greatly culpable in failing to see that a correct transcript was prepared. But even if the statement had been sufficiently definite as to points mentioned, there are other matters in connection therewith, which should have been made plain, but were altogether omitted. We shall refer to them hereafter, and, for the present, discuss those points which the agreed statement clearly presents.

I.

That the district court acquired jurisdiction in the first instance by the service of its process is conceded, but it is also conceded that after such jurisdiction was obtained, that the proceedings in bankruptcy were voluntarily dismissed by the petitioning creditors. The only effect of this dismissal was to oust the jurisdiction of the district court. And it would seem to require no argument to demonstrate this; for, if process and its service was necessary in one instance, it certainly was in another; if it was requisite anterior to dismissal in order to empower the court to act, it was equally requisite after the occurrence of dismissal. Proceedings in bankruptcy are purely statutory, and hence, unless the statute be pursued, no validity can attach to the act done. Sections 39 and 40 of the bankrupt act define the steps necessary to be taken with great particularity. The first named section provides, that a person, "subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt, on the petition," etc. And section 40, after prescribing those conditions as to service of copy of petition and order to show cause, etc., contains an express prohibitory clause against any "further proceedings

unless the debtor appear and consent thereto," until proof shall have been given to the satisfaction of the court of such service or publication." Section 14, of the same act, to which we have been referred, has no relevancy here, for that section, in providing that proceedings in bankruptcy shall operate as a dissolution of an attachment suit, "made within four months next preceding the commencement of said proceedings," evidently contemplates that such dissolution shall result only when other provisions of the act meet with compliance. These considerations induce the confident belief, that the act of re-instating the cause after its dismissal, and without further notice or appearance, was without authority of law, and that, consequently, any adjudication following such re-instatement was a mere usurpation, and absolutely void. It follows also, as an inevitable sequence, that the order directed to the sheriff, under which he paid the money to the assignee, can afford no protection to the officer who now invokes its aid.

II.

It is by no means certain, however, notwithstanding the lack of jurisdiction in the district court, that the plaintiffs were entitled to a recovery with respect to the $661.84.

It is well settled in this State, that an agreed case occupies the same footing, and stands in lieu of a special verdict (Mumford vs. Wilson, 15 Mo., 540), and the court pronounces the conclusion of law precisely as if a jury had found a verdict in that form. Now, in order that the conclusion of law on the facts agreed, or the facts found, may be pronounced, all the facts necessary to a determination of the case must first be definitely ascertained. If there be any ambiguity, any omission of facts necessary to a recovery, any substantial lack of clearness and certainty on material points, the judgment cannot be allowed to stand. (Lecompte vs. Wash, 9 Mo., 547.) In the case at bar, the agreed statement filed does not inform us, whether the debts sued for were those of the husband, or of the wife; whether the latter had any separate estate, or interest in the stock of millinery; whether those debts were

evidenced by notes, nor whether, if evidenced by notes, those notes were signed by the husband or by the wife, or by both. It is obvious that, if the wife had a separate estate in the millinery establishment, that it was attachable neither for the debts of the husband, nor of the wife; and it is equally obvious that such separate estate could only be reached by appropriate procedure in equity for that purpose, and not then, unless the wife had created a charge on her separate estate by such action on her part as would accomplish that end.

We might, indeed, assume that the property attached was that of the husband, and that the debts were his; but this is no case for assumptions. We will not undertake to pronounce the law, until the facts, on which the legal conclusion must be based, are first definitely ascertained.

In order that this may be done, and the cause tried on its merits, we shall reverse the judgment and remand the cause. Judges Vories and Wagner absent. The other judges concur.

FRANK SHEETZ AND FLORA BELLE SHEETZ, Respondents, *vs.* ASA F. KIRTLEY, Appellant.

1. *Administration—Annual settlements of administrators, etc., nature of—Final settlements.*—Annual settlements of administrators, curators, etc., are mere exhibits, which are merged in final settlements, and when the final settlements are set aside, they are fully open to examination and correction for fraud without the necessity of asking to have them set aside.

2. *Administration—Final settlements of guardians—Probate courts, judgments of nature of—When set aside.*—Final judgments of the probate court stand on a footing of equality with final judgments of the circuit court with reference to annulling them for fraud, and final settlements of administrators, guardians, and curators, have the force and effect of judgments, and can only be set aside in equity when they have been fraudulently procured.

Appeal from Livingston Circuit Court.

Collier & Mansur, for Appellant.

I. The final settlements of administrators and curators have the effect of judgments, and unless appealed from when

made in the probate court, are at law conclusive upon the parties interested. (Jones vs. Brinker, 20 Mo., 88; State vs. Rowland, 23 Mo., 98; Mitchell vs. Williams, 27 Mo., 400; Pierce, adm'r, vs. Bates, 47 Mo., 390.)

II. Such settlements (unless appealed from) can only be impeached and set aside in equity by a bill charging that they were falsely and fraudulently procured. (Sullivan Co. vs. Burgess, 37 Mo., 300; Linn vs. Williams, 54 Mo., 200; Jones vs. Brinker, 20 Mo., 88: State vs. Rowland, 23 Mo., 98; Mitchell vs. Williams, 27 Mo., 400; Pierce, adm'r, vs. Bates 47 Mo., 390; Madden vs. Madden, 27 Mo., 546; Clyce vs. Anderson, 49 Mo., 43.)

H. M. Pollard, with W. C. Samuel, for Respondents.

Hough, Judge, delivered the opinion of the court.

On the 2nd day of February, 1857, the defendant was appointed curator of the estate of Flora Belle Rucker, who afterwards intermarried with the plaintiff, Frank Sheetz. Annual settlements were regularly made by the defendant as required by law, until the year, 1867, when he made a final settlement. The regularity of this final settlement is not questioned. The defendant, however, failed to account at his final settlement, and at previous annual settlements, for the full amount of the legal interest on the money in his hands. The object of the present proceedings was to set aside the final settlement, and all the annual settlements made by the defendant, and to compel him to account for ten per cent. interest, computed with annual rests, on all the money in his hands from the beginning of his curatorship; and the petition alleged, that said defendant at all times received ten per cent. interest on the money of his ward, and that he failed to account for, but fraudulently retained and converted to his own use, the greater portion of said interest.

The defendant denied the foregoing allegations and averred that he had faithfully accounted for interest received by him, that he had never in any way used the money of his ward for his own benefit, and that for several years it was hazardous and

unsafe to loan money on any security that could be obtained, and, believing it to be for the best interest of his ward, kept the same intact in his own possession.

The circuit court set aside the final and the two preceding annual settlements, and charged the defendant with the sum of eleven hundred and forty-seven dollars and fifty-nine cents as due from, and unaccounted for by, him, on said settlements, and he has brought the case here by appeal.

It is wholly unnecessary in proceedings to surcharge and falsify the accounts of administrators, guardians or curators to ask to have the annual settlements set aside. They are not judgments but mere exhibits, which are merged in the final settlements; (Picot vs. Biddle's adm'r, 35 Mo., 29) and when the final settlement is set aside they are fully open to examination and correction, on account of any fraud committed in making them.

The only testimony, offered by the plaintiffs in support of their petition, was to the effect, that during the period for which the court charged the defendant with compound interest, and for several years prior thereto, money was in demand and loans could have been safely made. There was no attempt whatever to show that he had ever received any interest for which he had failed to account, or that he had himself used any portion of his ward's money, or that he was guilty of any fraudulent concealment of any matter, or of any false representations—in making or in procuring the approval by the probate court of his final settlement. The testimony, at most, only tended to show bare neglect, or an error of judgment as to the propriety of loaning the money; and this testimony, too, was not without contradiction. Was such testimony sufficient to warrant the court in setting aside the final settlement?

Conceding, for the sake of argument, that the evidence embodied in the record now before us, would, if it had been presented before the probate court when the final settlement was made, have furnished sufficient ground to that court for charging the defendant with the full amount of interest which the

plaintiffs now seek to recover, still it does not, by any means, follow that such evidence is sufficient to overthrow the judgment of that court in a proceeding like the present. The failure of the probate court to do its duty in the premises could undoubtedly have been remedied by an appeal from its judgment approving the final settlement. (Gen. Stat. 1865, ch. 116, § 50.)

But there is a broad distinction between the right to correct errors in a judgment on an appeal therefrom, and the right to annul for fraud a judgment unappealed from. Final judgments of the probate court stand on a footing of equality, in this respect, with final judgments of the circuit court. It has been repeatedly held in this State that final settlements of administrators, guardians, and curators have the force and effect of judgments, and they can only be set aside in equity when they have been fraudulently procured. Mere illegal allowances, unless obtained by fraud, will furnish no sufficient ground for impeaching their validity.

In the case of Jones vs. Brinker (20 Mo., 87) it was said, "it was never held, that, charging merely that the administrator had obtained *illegal* allowances in his favor, in his settlements made with the county court, was ground for applying to the chancery court to have such allowances set aside and vacated. He must charge that the allowances were procured by fraudulent and false means and pretenses, unjustly, to the injury of the estate and the parties interested." It is unnecessary to add that such averments must be supported by evidence, or the relief sought will be denied.

In the State vs. Roland, 23 Mo., 95, it was said "these settlements and allowances of administrators, curators and guardians are considered equivalent to judgments of a court of competent jurisdiction," and the allegations, required to be made by the party seeking to set them aside, were stated in the language employed in Jones vs. Brinker.

In Mitchell vs. Williams, (27 Mo., 399) it was decided to be necessary to establish by proof the charge of fraud in order to overcome settlements which have the effect of judg-

ments. To the same effect are Sullivan Co. vs. Burgess, (37 Mo., 300,) Picot vs. Bates, (47 Mo., 390,) and Lewis vs. Williams (54 Mo., 200).

In Clyce vs. Anderson (49 Mo., 37) some general language was employed, which might, upon a hasty examination of that case, be viewed as not altogether in harmony with the opinions entertained and expressed by this court in the cases heretofore cited. A closer scrutiny however will reveal the fact that the language so employed referred to certain omissions, false charges, and concealments of the executor, which were in effect fraudulent. Those acts of the executor in that case, which, though of doubtful propriety, and more than doubtful legality, were had and done by him in good faith, and without any fraud, were, together with the allowances based thereon by the probate court, left undisturbed.

In laying down the rule to be deduced from the cases on this subject, we have used substantially the language of the court in Lewis vs. Williams (54 Mo., 200), and any relaxation thereof, for the purpose of meeting apparently hard cases, can only result in making our judgments partial and confused. Ample time is given by the statute for taking appeals from the final settlements of guardians and curators, and it is better that all concerned should understand that some solemnity and binding force attaches to such settlements, and that they cannot be overhauled years afterwards to the detriment of innocent parties merely on account of illegal allowances. Such settlements must stand unless tainted with fraud or reversed on appeal.

The judgment will be reversed and the cause remanded. Judges Napton and Sherwood concur; Judges Wagner and Vories absent.

MIRANDA H. LEDBETTER, Respondent, *vs.* JOHN HALL, Appellant.

1. *Elections, contest over—County courts, judges of—Notice of contest, what requisite in—Statute, construction of.*—In a notice of the contest of the election of a judge of the county court (Wagn. Stat., 573, § 34), it is sufficient if the notice conforms to the statute, and it is not necessary to state the contestant's eligibility, nor that the result would have been different, if the irregularities had not occurred.

2. *Elections—Ballot, numbering of—Statute, construction of.*—If the judges of election do not cause to be placed on each ballot the number corresponding to the number of the voter offering it, it cannot be counted. (Wagn. Stat., 566, 567, § 15.)

Appeal from Gentry Circuit Court.

Geo. W. Lewis, with Bennett Pike & Vinton Pike, for Appellant.

I. The notice must set forth specifically and with precision the facts that, if true, would have changed the result. (Sknet's case, Brightly Lead. Elec. Cas., 320, and note.)

It is certainly insufficient, and the objection to any evidence was equivalent to a motion to quash the notice. (Wilson vs. Lucas, 43 Mo., 292-3; Castello's case, 28 Mo., 259.) It does not allege that he was eligible or qualified to hold the office he is contesting. (39 Mo., 388; 37 Mo., 330; 13 Mo., 542; 19 Mo., 63; 20 Mo., 87; 3 Sandf., 437; 4 Id., 681, 665, 7 Barb., 80; 16 Id., 89; 2 Conn., 210; 1 E. D. Smith, 164; 5 Sandf., 587.)

II. The action of the judges in counting the votes is conclusive, and the trial court should not reverse their action. Section 15 (Wagn. Stat., 566) is directory. Whether the statute is mandatory or not, depends upon whether the thing directed to be done is of the essence of that required. (Rex vs. Loxdale, 1 Burr, 447; Pot. Dwar., 224, note; 3 Denio, 249; 25 Wend., 696; 3 Hill, 43; 5 Cow., 269; 7 Hill, 9; 11 Wend., 604; 19 Id., 143; Pot. Dwar., 222, 223, 224; 2 N. H., 299.)

SHERWOOD, Judge, delivered the opinion of the court.

The contestant, Ledbetter, brought this suit against Hall, the contestee, in order to be declared and adjudged entitled to the office of Justice of the county court of Gentry county, in consequence of an election held in November, 1870. The only ground of contest was as to the vote cast in Miller township. Judgment went in favor of the contestant, and his adversary has appealed.

I.

Wagn. Stat., 573, § 54, provides, that: "In every contested election, the party contesting shall give to the opposite party notice in writing, ten days before the term of the court at which such contest is to be tried, specifying the grounds upon which he intends to rely, the names of all voters objected to, with the objections."

These provisions were complied with, and the grounds relied upon, the names of all voters objected to, and the objections were properly set forth, and the notice was served in due time, so there was no room for complaint on that score. The statement in the notice, that the contestant had been duly and legally elected to the office in controversy, necessarily implied his eligibility for the official position. But the statute, as above seen, makes no requirement of the kind in the notice referred to. As to whether the result would have been changed, had the alleged irregularities not occurred, was a matter to be determined by the evidence adduced at the trial, and was not requisite in the notice. It was sufficient to conform the notice to the statute, and this, as before stated, was done.

The case of Wilson vs. Lucas (43 Mo., 290), to which we have in this connection been cited, was based on section 80 of the same chapter, in relation to a contested election between candidates for the circuit judgeship, and the requisites of the petition to be filed under the provisions of that section; and hence that case can have no relevancy to the case before us.

II.

By the terms of section 15 of the chapter already under discussion, "it is made the duty of the judges to cause to be placed on each ballot the number corresponding with the number of the voter offering the same; and no ballot, not numbered, shall be counted."

All other grounds of contest were abandoned at the trial, except that the judges of election in Miller township failed to do their duty in the particular just adverted to. The evidence adduced established this neglect of duty. In the other townships the vote stood:

for contestant - - - - - - -	577
for contestee - - - - - - -	529
Leaving for contestant a majority of - -	48

But the township in dispute gave to the contestee 164 votes and to the contestant 83 votes, so that if Miller township could properly be included in determining the vote cast, the result would be

for contestee - - - 529 x 164 =	693
for contestant - - - 577 x 83 =	660
Giving a majority for contestee of - - -	33

The statutory prohibition, however, must be enforced, and its enforcement will give to contestant the majority, to which the court below held him entitled.

Judgment affirmed. The other judges concur. Judges Vories and Wagner absent.

JOHN A. TUGGLE, Respondent *vs.* THE ST. LOUIS, KANSAS CITY & NORTHERN RAILWAY COMPANY, Appellant.

1. *Practice, civil—Trials—Common carriers, liability of—Election.*—If a petition against a common carrier states a good cause of action, it is immaterial whether it is based on the liability of the common carrier by common law, or on a special contract, and the court has no right to call on the counsel for any explanation of the petition.
2. *Evidence—Agents, statements of.*—A statement by an agent of a railroad, that it was reported that there had been a delay in a freight train, and that, if the facts were as represented, the company ought to and would pay the damages, and requesting the party in interest to investigate the facts, is incompetent, and irrelevant in a suit against the road for damages from such delay.
3. *Practice, civil—Supreme Court—Illegal testimony—When will reverse.*—Where the evidence is conflicting, and illegal testimony is admitted, which might mislead a jury, the court might be required to send the case back for a new trial; but where there is no conflicting evidence, indeed no testimony for the appellant, it is more in accordance with the provisions of the statute (Wagn. Stat., 1067, § 33), to let the judgment stand.

Appeal from Circuit Court of Daviess County.

Shanklin, Low & McDougal, for Appellant.

I. The admissions of Wicker were clearly inadmissible. Admissions of an agent, to bind the principal, must be within the scope of his employment, and must have been made as a part of the transaction itself. (C. B. & Q. R. Co. vs. Lee, 60 Ill., 501; Betts vs. Farmers, &c. Co., 21 Wis., 87; Milwaukee, &c. R. Co. vs. Finney, 10 Wis., 388; Giles vs. Western R. Co., 8 Metc., 44; Chicago, &c. R. Co. vs. Riddle, 60 Ill., 534; Bellefontain R. Co. vs. Hunter, 33 Ind., 335; Anderson vs. R. Co., 54 N. Y., 334; Mobile, &c., R. Co. vs. Ashcraft, 48 Ala., 15; Luby vs. R. Co., 3 Smith [N. Y.], 731; Northwestern Packet Co. vs. Clough, Sup. Ct. U. S., Oct. term, 1874; 2 Cent. L. J., 83.)

Conover & Hicklin, for Respondent.

NAPTON, Judge, delivered the opinion of the court.

The petition in this case states, that the plaintiff was the owner of fifty-six fat hogs, and that he delivered them to the defendant to be transported from Jackson Station, in Daviess

county, to St. Louis; and in consideration of $70, defendant undertook to transport the said hogs with due speed, and in the usual time, and to use due care and diligence in delivering said hogs in good order and condition, and alleges that said hogs were not delivered at St. Louis in due time or in good condition, but that, by negligence, the cars were detained some twenty or thirty hours over the usual time required, and that, owing to said delay, some of said hogs died, and the others were materially damaged.

The defendant set up various defenses in the answer, but as none of them were attempted to be proved it is useless to recite them.

The plaintiff proved, that the hogs were placed on a car, as stated in the petition, without any special contract between plaintiff and defendant, except as to the price of the car load. Some statements were made by the station agent as to the time usually consumed by freight trains between Jackson and St. Louis. There was evidence to show, that, by reason of negligence and unnecessary delay, several hogs were lost, and the others very much deteriorated when they reached the market in St. Louis. Some evidence was also given in regard to a conversation between the agent of plaintiff and one Wicker, said to be the defendant's general freight agent at St. Louis. Objections were made to the evidence, but overruled. The plaintiff's agent called in company with his commission merchant, after he had sold his hogs, at the general freight office, and was introduced to Mr. Wicker, the superintendent, and thereupon Wicker said it was reported to him that there had been delay in the freight train in which plaintiff's hogs had been transported; that it was behind time, and he requested Mr. Buchanan, the commission merchant, to investigate the facts, which, if as represented to him, he thought the damages ought to be paid and would be paid by the company. An exception was taken to the admission of this evidence.

After the evidence of plaintiff was closed, the court required the plaintiff's counsel to elect as to whether they would

stand on defendant's common law liability as a common carrier, or upon an alleged special contract; upon which plaintiff's counsel said they had no special contract, and elected to stand on the common law liability of the defendant. Thereupon the defendant asked an instruction in the way of a demurrer to the evidence, that plaintiff could not recover. This instruction was refused, and then defendant's counsel requested the court to enter a judgment on the demurrer.

But the court refused to do this, and submitted the case to the jury on these instructions:

1. "If the jury believe that the plaintiff delivered said hogs to defendant, to be by defendant shipped to St. Louis, under an agreement between plaintiff's agent and defendant, that plaintiff was to pay defendant $52 for the shipping of said hogs, and that defendant received said hogs under such agreement, and undertook to ship them to St. Louis with due speed, or in the usual time, in good order and condition, and if they further believe, that in shipping said hogs the defendant, through its negligence or the negligence of its servants, employees, etc., kept said hogs on its road for a longer time than the usual time in so shipping them, and that, in consequence of such delay, said hogs were damaged, the jury will find for the plaintiff."

2. "If the jury find for the plaintiff, they will assess his damages at such sum, not exceeding $250, as they may believe from the evidence said hogs were injured by reason of the failure to deliver the same in the usual time in running their trains from Jackson Station to St. Louis."

The jury found a verdict for $150. The usual motions for new trial, etc., were made and overruled.

There was no demurrer to the petition. If it stated a cause of action, it was wholly immaterial whether it was based on common law liability of a carrier, or on a special contract; nor had the court any right to call for any explanation of the petition from the counsel. The conversation between the judge and the counsel is wholly immaterial.

The petition was sufficient, and the evidence sustained it, and there was no evidence offered to the contrary.

The instruction given to the jury was manifestly right, and the verdict was supported by the evidence.

In regard to the evidence concerning the conversation with Mr. Wicker, it was clearly not admissible; but we do not think that its admission is sufficient ground for reversing the judgment and ordering a new trial. It was simply irrelevant and wholly immaterial, and as there was testimony before the jury sufficient to justify their finding, it would not subserve the ends of justice to send the case back.

Wicker made no admissions at all; he merely said that reports had come to him that the engineer did not do his duty, and was unnecessarily behind time, and gave an opinion that, if these reports were true, the company ought to pay for the damage done. But he requested Mr. Buchanan to investigate the matter and report the facts to him. Mr. Wicker's opinion was of no more importance than that of any other man, and might well have been excluded; but we cannot see that the defendant was anywise prejudiced by it. The evidence seems to have been introduced merely to show that defendant, or one of its agents, had been applied to for an adjustment of this claim, and a promise made by such agent, that it would be investigated. The evidence had nothing to do with the case.

Undoubtedly, where the evidence is conflicting, and illegal testimony is admitted, which might perchance mislead a jury, we might be required to send the case back for a new trial; but as there was no conflicting evidence, indeed no testimony for the defense offered, and the point relied on is based wholly on the decision of the court on the demurrer, we think it more in accordance with the provision of our statute (Wagn. Stat., 1067, § 33), to let the judgment stand.

The judgment is affirmed. Judges Wagner and Vories absent; the other judges concur.

JOHN S. KELLOGG, ETC., Respondent, *vs.* JOSEPH MALIN, Appellant.

1. *Conveyances—Covenant against incumbrances, to whom survives—Administrator.*—A covenant against incumbrances in a conveyance is personal, and an action thereon may be brought by the administrator.
2. *Practice, civil—Pleadings—Misjoinder—Demurrer—Waiver.*—A defendant, unless he demurs, will be considered to have waived the objection of misjoinder of parties.
3. *Evidence—Incumbrances, covenant against—Right of way—Object in purchasing.*—Evidence of plaintiff's object in purchasing is inadmissible in a suit for damages on the covenant against incumbrances on account of the existence of a right of way.
4. *Evidence—Incumbrances, covenant against—Right of way, benefit therefrom.*—In a suit for breach of covenant against incumbrances by reason of a right of way by a railroad, evidence of the enhanced value of the land by reason of the railroad, or of privileges accorded by the railroad, is inadmissible.
5. *Witnesses—Deceased party, contract with.*—In a suit against C. by A. for himself, and as administrator of B., C. is inadmissible as a witness to prove that he settled the matter in controversy with B. during his life time.
6. *Contracts—Incumbrances, covenant against—Breach of—Damages, measure of.*—In a suit for breach of covenant against incumbrances, if the incumbrance has inflicted no actual injury on the plaintiff, and he has paid nothing towards removing or extinguishing it, he can recover only nominal damages; if he has removed and paid it off, he can recover what he paid for that purpose, if it be a reasonable and fair price; if he has sustained actual injury, the damages are to be proportioned to the actual loss sustained, and if it be of such a character that it cannot be extinguished, as an easement or servitude, the damages are to be estimated according to the injury arising from its continuance.
7. *Contracts—Incumbrances, covenant against—Easement perpetual—Occupancy of part by privilege—Damages, measure of.*—A party having a perpetual easement allowed the owner of the servient estate to occupy a part of the land covered by the easement. In a suit by this owner against his grantor for breach of covenant against incumbrances by reason of this easement; *held*, that this occupancy was a question only between the holders of the dominant and servient estates, and was a privilege which might be revoked at any time, and that the fact, that the easement was perpetual, was rightfully taken into consideration in assessing the damages.

Appeal from Buchanan Circuit Court.

Doniphan & Reed, with A. H. Vories, for Appellant.

I. The measure of damages could be no more than a just compensation for continuance of incumbrance. (3 Cush., 206; 5 Wis., 22; 4 Kent, 476.)

II. An easement apparent to grantee is not embraced in a general covenant. (22 Wis., 628; 16 Ind., 142.)

III. If plaintiff was entitled to recover at all, the measure of damage would be only the consideration money and interest. (4 Dant, 475; 14 Pick., 128; 14 Conn., 245; 4 Johns., 1; 13 Id., 50; Caswell vs. Wardell, 4 Mass., 108; Martin vs. Long, 3 Mo., 391.)

IV. In this case the incumbrance was patent, and the land bought on speculation, and far below its value to the purchasers. In such case the purchaser is not entitled to recover. (3 Dess., 245; Waterman's Dart Vend. & Purch. Real Est., 376, and note.)

B. Pike & H. K. White, for Respondent.

I. If there was a misjoinder of parties, the objection was waived by answer. (Kellogg vs. Malin, 50 Mo., 496; Beddoe's Ex'r vs. Woodworth, 21 Wend., 120; Horstkotte vs. Menier, 50 Mo., 158; Shelton vs. Pease, 10 Mass. 473; Bredow vs. Mut. Sav. Ass'n, 28 Mo., 181.)

II. Defendant, Malin, was incompetent to testify as to the alleged settlement with Palmer and the original consideration. (Stanton vs. Ryan, 41 Mo., 511.)

III. The breach of the covenant was a chose in action belonging to the partnership, and as such collectable by the survivor. (Bredow vs. Mut. Sav. Inst., 28 Mo., 181.)

WAGNER, Judge, delivered the opinion of the court.

Plaintiff, Kellogg, for himself and as administrator of the effects of his former partner, Palmer, brought this action against the defendant for a breach of covenant against incumbrances. The breach consisted in the right of way, which was decreed by an order of court to the Platte County Railroad, previous to the sale, and for which the defendant received pay.

The answer admitted the execution and delivery of the deed, and the purchase of the land as partnership property, and the existence of the incumbrance. It alleged as defenses,

that the grantees had only been partially excluded from the right of way vested in the railroad company, and that defendant and Palmer in his lifetime had compromised and settled the matter in dispute, and that the grantees had knowledge of the incumbrance when they bought. It further alleged, that Kellogg had made a final settlement of the administration of the partnership affairs. A replication was filed, denying all the new matter set up in the answer.

When the cause came on for trial the defendant objected to the introduction of any testimony by the plaintiffs, on the ground that the petition did not state a cause of action; that it showed that the land was conveyed to Kellogg & Palmer, then dead, and that the cause of action survived to Palmer's heirs, and not to the administrator; and that Kellogg could not bring the action in his own name, and also in his capacity as administrator. The court overruled the objection. This ruling, we think, was entirely correct. The covenant against a breach of encumbrances is a personal covenant, and may well be brought by the administrator. There is no insuperable difficulty presented in the joinder of the parties, but if the defendant thought there was a misjoinder, he should have raised the objection by demurrer; and, failing to do so, he must be regarded as having waived it.

Both parties introduced evidence in regard to the amount the plaintiffs were damaged by reason of the right of way, some of the plaintiff's witnesses placing the damages as high as one hundred dollars an acre; whilst some of the defendant's witnesses testified, that plaintiffs suffered no damages, but were benefitted by the road running through the land.

After this examination had progressed for some time, the court stopped it, and excluded all the evidence of this character, and announced that the measure of damages would be declared to be the value of the land taken at the time of the delivery of the deed from defendant to plaintiffs, and six per cent. interest thereon from that time.

Defendant read upon the trial the deposition of Alexander, certain portions of which were excluded, to which rulings ex-

ceptions were taken. One part of the deposition, which was ruled out, related to what Palmer said he was buying the land for, and stated that he could get accomodations from the road. This evidence was neither material nor legitimate. It made no difference about Palmer's motives in making the purchase; they constituted no element in the case. The other parts stricken out stated that the railroad was built in 1860, before plaintiffs purchased; that the construction of the road doubled the prices of land, and that in 1865, when the deed was made, the road was a benefit to the land; that, if the road was taken away, the land would not be worth as much by one-third, and that, at the time the purchase was made, plaintiffs were shipping their wood, and nobody could get accomodations on the road, except those connected with it. All this evidence was obviously irrelevant and properly rejected. The advantages and disadvantages spoken of were common to the whole country, and not peculiar to the land in controversy, and whatever favors the plaintiffs obtained from the road had nothing to do with the question.

Defendant further offered to prove by the deposition of one Nicely, that he had a conversation with Palmer, and that Palmer stated to him, that he and Kellogg purchased the land for the wood that was on it, and on account of facilities furnished by the railroad for getting it to the market. The court committed no error in ruling out this testimony; it had nothing to do with the issue presented on the trial.

Defendant then offered himself as a witness, and proposed to give evidence, that, during the lifetime of Palmer, he had settled with him on account of the right of way, and that the whole matter of the suit had been by them adjusted. This evidence was objected to, and this court sustained the objection. The witness was incompetent under the statute. He could not give evidence of a contract of settlement made with a person who was dead. The parties were on unequal terms, and the defendant was disqualified.

The right of way condemned, and which the road paid for, was a strip one hundred feet wide; but it was shown that the

road did not use the whole one hundred feet, and that the plaintiffs occupied and cultivated what was not actually used by the road; and it is thence contended, that plaintiffs can only recover for the amount actually possessed and in use by the road. This is really the most difficult point in the case, in fixing upon the true measure or criterion of damages; and the measure of damages is the only question entitled to any consideration.

There is nothing in the plaintiff's instructions requiring any especial mention, and the defendant's instructions were rightfully refused, as they were contrary to the law as laid down in this case, when it was here before. (Kellogg vs. Malin, 50 Mo., 496.)

The instructions given by the court of its own motion is the principal one, and is as follows: "If the jury find, that, at the time of the delivery by defendant to plaintiffs, the railroad company actually occupied a part of said land with the knowledge of the plaintiffs, then, in estimating the damages, they will take into consideration the amount of land so occupied, coupled with the perpetual right in said railroad company to occupy a strip on each side of the centre of their track of the width of fifty feet, and to the amount so obtained they will add six per cent. interest, from the delivery of the deed to the present time, and they will exclude all other damages."

The rule is well settled as to the measure of damages for a breach of covenant against incumbrances; and is generally very simple. The covenant being treated as one of indemnity, if the incumbrance has inflicted no actual injury upon the plaintiff, and he has paid nothing towards removing or extinguishing it, he can obtain but nominal damages, as he is not allowed to recover a certain compensation for running the risk of an uncertain injury. If the grantee has removed and paid off the incumbrance, the measure of damages is what he paid for that purpose, if it be a reasonable and fair price. (Henderson vs. Henderson, 13 Mo., 151; St. Louis vs. Bissell, 46 Mo., 157.)

When, however, the incumbrance has inflicted an actual injury upon the purchaser, the rule can only be, generally stated to be, that the damages are sought to be proportioned to the actual loss sustained. Thus, if the incumbrance be of a character which cannot be extinguished, such as an easement or servitude, an existing lease or the like, it is said that the damages are to be estimated by the jury according to the injury arising from its continuance. (Rawle Cov. Tit., 3d ed., 136, and cases cited.) There is a good reason for the distinction. In case of an incumbrance by an ordinary lien or mortgage, the grantee may pay off the incumbrance at any time, and free the premises, or the person who made the lien or mortgage may extinguish them, and the grantee may never be injured. But an easement or servitude is unextinguishable by any act of the parties either grantor or grantee, and, if its continuance is permanent, the damages must be assessed accordingly. In the present case the easement was perpetual, and therefore it was proper for the jury to take the whole right of way into consideration as well as that actually occupied. That the company permitted the plaintiffs to use a portion of the strip, was a matter between the company and the plaintiffs, and the privilege might be withdrawn at any time. But there was an easement, a perpetual incumbrance on the premises, and it was rightfully taken into consideration in assessing the damages.

We find no substantial error in the instruction, and we think the judgment should be affirmed. All the judges concur, except Judge Vories, who is absent.

WILLIAM N. R. BEALL, Respondent, *vs.* JAMES E. JANUARY, Appellant.

1. *Practice, civil—Pleadings—Answer—Notes, defenses against—Agents' disobedience, ratification of.*—Where a party orders his agent at specified dates to make sales for him, and receives an account of sales from him, and subse-

quently gives the agent notes for the balance due on such sales, with full knowledge that his instructions had been disobeyed, he cannot, in a suit on such notes by the agent, urge as a defense thereto that his instructions were disobeyed and he was damaged thereby, and that the notes were without consideration.

2. *Practice, civil–Pleadings–Answer–Notes–False representations.*—In a suit on a note by the payee, the maker alleged that he employed the payee to make sales for him, directing him to sell when the market price would yield a profit to the maker; that the payee falsely and fraudulently represented that he had sold the goods to the best advantage, but still at a loss, and the maker relying on said representations, had made the notes to cover the loss to the payee; that in fact the representations were false, and that the goods could have been sold at a profit, and that the notes were without consideration, *held*, that this was a good defense.

3. *Practice, civil—Pleadings—Alternative defenses.*—When matter in defense is pleaded in the alternative, each alternative must, by itself, if true, constitute a defense; otherwise the plea will be bad.

Appeal from Carroll Circuit Court.

Hale & Eads, for Appellant, cited Pomeroy vs. Benton, 57 Mo., 531; Wannell vs. Kem, 57 Mo., 478; Brown vs. Worth, 21 Mo., 528; City Bk. of Columbus vs. Phillips, 22 Mo., 85; Stevens vs. Spears, 25 Mo., 386; Young vs. White, 18 Mo., 98; Sto. Eq. [5 ed.], § 523, and cases cited.

L. H. Waters, for Respondent.

I. Where there has been an accounting between the parties, and a bill or note given in settlement of the amount found due, in an action upon such bill or note the defendant cannot impeach the charges contained in the account thus settled. (Chit. Cont., 9 Am. ed., 670.) And such an adjustment is a bar to all discovery and relief, unless some matter is shown by which the account is in truth vitiated. (Sto. Eq. Jur., 523; Drew vs. Power, 1 Schoales & Lefr., 192; Sto. Eq. Pl., 797–800; Taylor vs. Haylin, 2 Brown Ch. R., 311; Perkins vs. Hart's Adm'r, 11 Wheat., 237; 1 Ves., 317; Sherburne vs. Inchiquin, 1 Brown Ch. R., 238; Fuller vs. Crittenden, 9 Conn., 406; Martin vs. Beckwith, 4 Wis., 219; Goodwin vs. U. S. An. Life Ins. Co., 24 Conn., 591; 1 Sto. Eq. Jur., § 527; Draper vs. Owsley, 15 Mo., 516; Pomeroy vs. Benton, 57

Mo., 531; Stackpole vs. Arnold, 11 Mass., 32; Livingston vs. Dugan, 20 Mo., 102; Stephens vs. Spiers, 25 Mo., 386, Dawson vs. Remnant, 6 Esp., 24; Knox vs. Whalley, 1 Esp., 160.)

Ray & Ray, for Respondent.

Hough, Judge, delivered the opinion of the court.

The plaintiff, as payee, brought suit upon four promissory notes executed and delivered to him by the defendant.

The defendant in his answer admitted the execution and delivery of the notes sued on, but averred that they were obtained by fraud, and were wholly without consideration, and also set up a counter-claim.

It appears from the answer, which is somewhat involved and obscure, that in the month of October, 1872, the defendant, who resided at Carrollton, Missouri, engaged the plaintiff, who was a commission merchant in the city of St. Louis, to purchase, hold, and sell for him when ordered, a large quantity of dried fruit. In January, 1873, he also engaged plaintiff to purchase, hold, and sell for him when ordered, a large quantity of flour. In pursuance of his employment, the plaintiff, at various times in the months of November and December, 1872, purchased a large quantity of dried fruit, and in the latter part of January, or the early part of February, 1873, plaintiff purchased six hundred barrels of flour, and notified the defendant thereof. It further appears, that in December, 1872, and in January, 1873, the defendant ordered and directed the plaintiff to sell the fruit, which he represented that he had purchased, whenever a profit could be made thereon, and that in February, 1873, he ordered and directed the plaintiff to sell the flour reported to have been purchased, "whenever the same could be sold so as to bring defendant out even on said flour."

About the 8th of September, 1873, the plaintiff sent to the defendant at Carrollton an account of sales of said fruit and flour, giving the cost thereof, the prices for which they were sold, and the dates of said sales, from which account it ap-

peared that the six hundred barrels of flour were sold at various times during the months of June, July, August and September, 1873, and that one hundred and sixty-two sacks of fruit were sold sometime in December, 1872, and nine hundred and one sacks during the months of May and June, 1873. It was then averred, "that afterwards, to-wit: about the 28th day of October, 1873, the plaintiff came to the defendant, in the town of Carrollton, and presented to him the statements of said transactions, as contained in said exhibits, and claimed and represented to this defendant, that he had bought said fruit and flour under, or by virtue of, said arrangements with defendant, as aforesaid; that he had used due care, diligence and skill in the purchase, handling and sale of said articles; that he had obtained the best prices therefor that could have been obtained under the orders and directions of defendant, and according to his best skill and ability; that defendant having no personal information as to the facts of the said transactions, except from the statements and representations of plaintiff, as aforesaid; and relying on the truth and fairness of said statements and representations, executed and delivered to plaintiff the four several notes sued on in this cause, making, in the aggregate, the said sum of $2,154.28, the sum claimed by plaintiff, as aforesaid, which facts and transactions were and are the sole and only consideration of and for said several notes; and they were each and all executed and given under these circumstances. And defendant alleges and charges, that said statements and representations of plaintiff, as contained in said accounts above referred to, and said statements and representations so made by plaintiff to defendant at the date of the execution of said notes, were false and fraudulent, and made with the intent to deceive this defendant, and to obtain the said notes, in this; that said flour was not sold by plaintiff, when he was ordered to do so as aforesaid by defendant, when it could have been sold without loss to defendant; that the same could have been sold in the latter part of February 1873, or during the month of March, 1873, for a profit of at least ten per cent. on

the purchase, and that said fruit, if plaintiff had in fact purchased the amount and kind represented, of which this defendant is wholly ignorant, except from said statements of plaintiff as aforesaid, if sold at or about the time plaintiff claims in said accounts and statements to have sold said one hundred and sixty-two sacks, in December, 1872, or at any time during the months of January, February, March or April, 1873, would and could have been sold, on the market in St. Louis, for an amount sufficient to have paid to this defendant a profit of at least ten per cent. on the amount of said purchase, which is represented in said statements and accounts to be one thousand and sixty-two sacks, at an aggregate price of $3,109.07. But as to whether plaintiff in fact purchased the full amount as alleged, or as to whether he in fact purchased more than about five hundred sacks of such fruit, this defendant has no knowledge or information sufficient to form a belief, as to which allegation is true: but he alleges and charges, that one or other of said allegations is true—that is, that he purchased the full amount as represented, and failed to sell the same for the best price that could have been obtained, as above charged, or that he only purchased about five hundred sacks, as above stated, and failed to sell the same when ordered, for the best prices which could be obtained, as aforesaid—and in either event defendant charges, that said statements and representations were false and fraudulent, and that said notes, and each of them, are wholly without consideration, and plaintiff ought not to have and recover of this defendant any sum whatever."

The court refused to permit the defendant to introduce any evidence under his answer, on the ground that the facts stated therein constituted no defense to the notes. The defendant refused to amend; final judgment was rendered for the plaintiff, and the defendant has appealed.

It is contended by the plaintiff, that as it appeared from the answer that the defendant had the account of sales in his possession from about the 8th of September, 1873, until the

28th of October, 1873. when the notes were given, and therefore knew precisely when, and for what prices, the fruit and flour sold, and with such knowledge gave the notes in suit, that he is concluded by the settlement so made.

The counsel for the plaintiff do not seem to apprehend what we conceive to be the gist of the defense. It will be observed, on inspection of the answer, that the defendant does not allege that he ordered or directed the plaintiff to sell the fruit or flour on any specified day or date. If such were the allegation, and that were all, and the defendant had, with full knowledge that his instructions had been disobeyed, ratified the act of his agent by giving his notes for the balance found to be due from him on such sales, most certainly he could not afterwards be heard to complain, when sued on the notes, that his instructions had been disregarded, that he had been damaged thereby, and that his notes were without consideration. The case presented by the answer, as we understand it, is an entirely different one.

It is substantially averred, that the plaintiff was to sell the fruit whenever he could do so at an advance, and the flour whenever he could do so without loss; that when the account of sales was presented to the defendant, and before the notes were given, the plaintiff represented to him that there was no time, prior to the times at which he did sell, when he could have obtained better prices than it appeared from the account of sales he did obtain; that such representations were false; that during the whole of the month of March, and the latter part of February, 1873, the flour could have been sold at an advance of ten per cent. and that at one time in December, 1872, and at any time in the months of January, February, March and April, 1873, the fruit could have been sold at an advance of ten per cent also; that at the time the notes were given the defendant had no knowledge of these facts, and relied on the representations of his agent, the plaintiff, and that the said representations of the plaintiff were false and fraudulent, and were made with the intent to deceive said defendant, and to obtain the notes in suit.

There can be no question, we think, but that these facts, if true, constitute a defense to the notes. There is no occasion to remark, as the case now stands, upon the good faith which will discharge a commission merchant, who, in the exercise of ordinary diligence and discretion, makes sales for others which result in loss.

That portion of the answer, in which defendant attempted to charge that the statement rendered by the plaintiff of the amount of fruit purchased was false and fraudulent, was not well pleaded. It alleges that the defendant had no knowledge or information sufficient to form a belief, as to whether the plaintiff in fact purchased the quantity which he reported he had purchased, viz: one thousand and sixty-two sacks, or whether he only purchased five hundred sacks; but it is averred that one or the other was true.

When a party defendant pleads matter in defense in the alternative, each of the alternatives must, by itself, if true, constitute a defense; otherwise the plea will be bad.

As the counter-claim was based on the loss alleged to have been suffered by the failure of the plaintiff to perform his duty in the premises, it will not be necessary to notice it.

We are of the opinion that the court erred in refusing to permit the defendant to introduce any testimony to support his answer, and the judgment will therefore be reversed and the cause remanded. Judges Napton and Sherwood concur; Judges Wagner and Vories absent.

EDWARD B. WAPLES, Appellant, *vs.* JASPER JONES, Respondent.

1. *Mortgages and deeds of trust—Notes—Contemporaneous acts, how construed.*—Where the execution of a deed of trust, and the signing and delivery of the notes therein mentioned, are contemporaneous acts, they form parts of a single transaction, and must all be read and construed together. (Brownlee vs. Arnold, 60 Mo., 79.)

2. *Bills and notes—Interest, when a debt.*—If, by agreement, interest on a note is to be paid annually, this constitutes a debt, if the parties make it so by their contract.

3. *Mortgages and deeds of trust—Notes—Interest due, agreement to compound—Effect of.*—By agreement in a deed of trust the interest on a note, if not paid when due, should be compounded, *Held*, this was no waiver of the right to enforce its payment when due.

Appeal from Livingston Circuit Court.

C. H. Mansur, for Appellant.

I. The two notes and the deed of trust are to be construed as one instrument, and all taken together form but one contract. (Brownlee vs. Arnold, 60 Mo., 79, and cases cited; Cornell vs. Todd, 2 Den., 123, and authorities cited.)

II. The payer in the note, and he alone, had the right to determine whether the interest must be paid annually, or whether he would permit it to run as a part of the principal, bearing the same rate of interest. (2 Pars. Cont., 5 ed., 506, 507, and note *m.*; Dann vs. Spurrier, 3 B. & P., 399.)

H. C. Samuel, for Respondent.

I. It was at the option of the makers to pay the interest annually, or have it compounded and bear the same rate of interest as the principal, as provided in the notes and deed of trust. (Smith vs. Sanborn, 11 John., 59; 2 Pars Cont., 2 ed., 170, 171.)

WAGNER, Judge, delivered the opinion of the court.

This was a proceeding originally instituted under sections 38 and 39 of the landlord and tenant act (Wagn. Stat., 883, 884), before a justice of the peace, to recover the possession of a tract of land. In the justice's court the plaintiff had judgment; but on an appeal and trial in the circuit court, the judgment was for defendant.

The plaintiff claims title under a sale made by a trustee by virtue of a deed of trust; and the only question decided by the court below, and which is now here for revision, was, that the sale was prematurely made, and that no title passed.

From the facts in the case it appears that Charles E. Jones and Elizabeth, his wife, in March, 1874, executed to Joseph

A. Cooper, as trustee, their deed of trust, conveying to him the land in controversy, to secure the payment of two promissory notes therein described, of even date with the deed, and payable to one John H. Ware. Charles E. Jones rented the land to the defendant, after the making of the deed of trust, but before the sale thereunder, and this proceeding was against him as Charles E.'s tenant.

The case depends wholly upon the construction to be given to the following provision of the deed of trust, as to when the payments were due which would authorize a sale: "Whereas the said parties of the first part have this day made and executed and delivered to the said party of the third part their promissory notes of even date herewith, by which they promise to pay to the said John H. Ware or order, for value received, two thousand one hundred and twenty dollars, three years after date, one note for the sum of two thousand dollars, payable at the banking house of the Peoples' Saving Bank at Chillicothe, with ten per cent. interest per annum from date, interest due and to be paid annually, and if not paid annually to be compounded and bear the same rate of interest as the principal. The other note for the sum of one hundred and twenty dollars, payable at the said Peoples' Saving Bank, both due in three years from this date, and bearing ten per cent. interest per annum, interest to be due and payable annually, and if not paid annually to be compounded and bear the same rate of interest as the principal. * * * * Now, therefore, if the said parties of the first part, or any one of them, shall well and truly pay off and discharge the debt and interest expressed in said notes and every part thereof, when the same becomes due and payable according to the true tenor, date and effect of said notes, then this deed shall be void, and the property hereinbefore conveyed shall be released at the cost of the said parties of the first part; but should the said first parties fail or refuse to pay the said debt, or the said interest or any part thereof, when the same or any part thereof shall become due and payable, according to the true tenor, date and effect of said notes, then the whole shall become due and payable," etc.

The deed then authorized the trustee to proceed and sell the land, when there was a failure to pay according to its provisions.

Default was made in the payment of the first year's interest, and at the request of the holder of the notes, the trustee, after giving the required notice, sold the land, and the plaintiff became the purchaser.

The court declared the law to be, that the trustee had no right or power to make the sale under the deed of trust, until the lapse of three years from the date of the deed, and that the sale made by the trustee, and the deed made in pursuance thereof, passed no title to the plaintiff.

The execution of the deed of trust, and the signing and delivery of the notes, were contemporaneous acts, and must all be read and construed together. They form parts of a single transaction. (Brownlee vs. Arnold, 60 Mo., 79.)

In the case just cited a deed of trust was given to secure the payment of four promissory notes, falling due at one, two, three and four years after date. There was a condition in the deed, that the notes should not become due, nor the deed of trust foreclosed, until the fourth note should mature; and it was held that it was competent to the parties to the contract to so arrange the matter between themselves that none of the notes should fall due until such time as the last one by its terms became payable.

The parties had the undisputed right to provide for a sale if the interest was not paid annually, if they saw proper to make such a contract. Nothing is more common than, when a deed of trust is made to secure the payment of several promissory notes, falling due at different periods, to provide that, if the first note is not paid at maturity, then all the notes shall become due and payable, and the trustee shall sell for the whole amount.

If the agreement is, that interest shall be payable annually, this constitutes a debt, if the parties make it so by their contract.

The interest in this case was to be paid annually, and if not paid it was to be compounded; but the agreement for compounding it was no waiver of the right to enforce its payment when due, if the party elected so to proceed.

The deed declares, that, if the parties of the first part fail or refuse to pay the debt or the interest, when they become due, then the whole shall become due and payable. This language is susceptible of but one interpretation; it can import but one thing, viz: that if the interest was not paid annually, as it became due, then the whole debt, principal and interest, should become due and payable at the election of the holder of the notes, and he might require the trustee to sell for the whole debt.

The court, therefore, in its ruling, committed manifest error. There can be no doubt of the plaintiff's right to pursue his remedy under the landlord and tenant act.

The judgment should be reversed and the cause remanded. All the other judges concur, except Judge Vories, who is absent.

THE ST. JOSEPH BOARD OF PUBLIC SCHOOLS, Relator, *vs.* BERNARD PATTEN, AND OTHERS, AND THE COUNTY COURT OF BUCHANAN COUNTY, Respondents.

1. *Constitution—Taxation, rates of—Proviso allowing alteration—When goes into effect.*—The provision of the constitution, limiting the rate of taxation, does not require legislative action to enforce it, and goes into effect at once, notwithstanding the proviso allowing the rate to be increased by legislative action and a specified popular vote.
2. *Legislature—Compulsion to make laws.*—Under our system of government there is no power to compel the legislature to make laws.

Petition for Mandamus.

H. K. White & W. P. Hall, for Relator.

I. There is no authority for calling special elections at all, and there is no authority for elections by the tax payers for

any purpose. The constitution does not enforce itself. (St. Jo. & Denver City R. R. Co. vs. Buchanan County Court, 39 Mo., 488–89; Graves vs. Slaughter, 15 Pet., 496.)

II. For the purpose of preventing the stoppage of the public schools from lack of money, as well as for other purposes, section 1 of the schedule was inserted in the constitution. (Laws of Mo., 1874, pp. 148, 149, § 4.)

III. The provision of the constitution, which limits the school tax to four mills, does not require legislation to enforce it, and if that provision stood alone, the objection would be conclusive. But it is only a part of an entire provision, and to give effect to the whole legislation is necessary, and hence, section 1 of the schedule applies.

IV. The section of relator's charter as well as the section of the general school law, on the subject of taxes, is inconsistent with section 11 of art. 10, of the constitution, and that section requires legislation to enforce it. Hence, the spirit of the constitution keeps these sections of the law in force until July, 1877, or until repealed by legislation.

M. H. Ranney, for Respondents, cited New Const., art. 10, § 11; Id., schedule, § 1.

Napton, Judge, delivered the opinion of the court.

The St. Joseph Board of Public Schools is a corporation created by acts of the legislature of March 3d, 1866, and March 20th, 1872, and by those acts authorized to estimate the amount of money requisite for the purpose of building and repairing school houses and furnishing the same, and paying salaries of teachers and officers, and to meet other contingent expenses, and to make out and certify under the seal of the corporation their annual estimates, and file a copy of the same with the clerk of the county court of Buchanan county, on or before the first Monday of August in each year. The county court is then required by these enactments to levy the amount so certified on the taxable property, real and personal, in said school district (the limits of which are pre-

viously defined), provided that the tax shall not exceed seven mills on the dollar for any one year.

This estimate having been made for the present year, and requiring a levy of seven mills on the dollar to meet the expenses reported, the county court made a levy of only four mills on the dollar, and refused to levy the seven mills as required under the acts of the legislature aforesaid. To compel the court to levy the seven mills, is the object of the application to this court.

The present constitution of this State, which went into effect on the 30th day of November, 1875, in the 11th section of the 10th article, concerning revenue and taxation, declares that taxation for school purposes in school districts shall not exceed 40 cents on the hundred dollars, with a proviso, that this rate may be increased in districts formed of cities and towns to an amount not to exceed one dollar on the hundred dollars valuation, and in other districts to an amount not to exceed sixty-five cents on the hundred dollars valuation, on the condition that a majority of the voters, who are tax payers, voting at an election held to decide the question, vote for the increase.

In the schedule it is declared, that the provisions of all laws, which are inconsistent with this constitution, shall cease upon its adoption, except that all laws, that are in consistent with such provisions of this constitution, as require legislation to enforce them, shall remain in force until the 1st day of July, 1877, unless sooner amended or repealed by the General Assembly.

This restriction in the constitution in regard to taxation for school purposes to forty cents on the hundred dollars, unquestionably requires no legislation to enforce it; nor is it contended on the part of the petitioners here, that it does. But it is insisted that the restriction or prohibition, not being absolute, but liable to be removed by legislative action and a specified popular vote, in accordance with such legislative action, both the restriction, and the subsequent clause of the constitution providing a mode of avoiding it, must share the

same fate, and both alike await the result of legislative action. In other words, as the proviso, which points out a mode of increasing the tax and removing the restriction to a certain extent, does need legislative action before it can be effectuated, the restriction itself, though confessedly needing no legislation to enforce it, must, like the mode of avoiding it, remain inoperative until the legislature shall provide such mode.

The question is an important one, not only as regards the interests involved in the present application, but as its decision must affect various other provisions of the constitution in reference to taxation accompanied with similar provisos.

Immediately succeeding this clause in relation to taxation for school purposes, follow similar restrictions and similar provisions by which the restrictions may be removed. Thus in the same section it is provided: "For the purpose of erecting public buildings in counties, cities, or school districts, the rates of taxation herein limited may be increased when the rate of such increase, and the purpose for which it was intended, shall have been submitted to a vote of the people, and two-thirds of the qualified voters of such county, city, or school district, voting at such election, shall vote therefor." And section 12 declares, that: "No county, city, town or township school district, or other political incorporation, or sub-division of the State, shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount, including existing indebtedness, in the aggregate exceeding 5 per cent. on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for State and county purposes previous to the incurring of such indebtedness: provided, that with such assent any county may be allowed to become indebted to a larger amount for the erection of a court house

or jail; and provided further, that any city, town, township, school district, or other political corporation or sub-division of the State, incurring any indebtedness, requiring the assent of the voters as aforesaid, shall, before or at the time of doing so, provide for the collection of an annual tax, sufficient to pay the interest on such indebtedness, as it falls due, and also, to constitute a sinking fund for payment of the principal thereof within twenty years from the time of contracting the same."

In the first part of section 10, the constitutional rates of taxation for county, city, town and school purposes are fixed. The provisions above quoted allow certain modifications of these rates. The question then is, must the rates of taxation fixed in the constitution, when accompanied with provisions in that instrument authorizing their modification, await the action of the legislature to provide the means of obtaining such modification before the rates themselves go into operation?

The 15th section of the schedule to the constitution declares, that "the General Assembly shall pass all such laws as may be necessary to carry this constitution into full effect." There is no way of enforcing this injunction on the legislature. Under our system of government there is no power to compel the legislative department of government to make laws. Constitutions may restrict legislative powers, and declare what laws shall not be valid; but, from the very nature of legislative power, its exercise in a particular case must depend upon the volition of the legislature. Responsibility to a constituency, and a sense of public duty, are the only incentives which can prompt legislative action.

In the first constitution of this State, adopted on its admission into the Union, and in the succeeding one, adopted in 1865, the General Assembly was directed to provide by law a mode of suing the State; yet it is well known that for upwards of fifty years this mandate was disregarded, and no one ever suggested that it could be enforced, unless it was the pleasure of the legislature that it should be.

If then the rates of taxation declared in the 11th and 12th sections of the 10th article of the constitution depend for their enforcement upon the action of the legislative department of the government, they are mere abstractions, mere declarations of the opinion of the convention which framed the constitution, entitled of course to such weight as the opinions of so able and respectable a body necessarily possess, but effecting no constitutional barriers against legislative extravagance or constitutional assurances of retrenchment in public expenditures and taxation consequent thereon.

The convention were doubtless aware of their inability to coerce the legislative department into the enactment of laws, which, in the opinion of the convention, were desirable, and, therefore, declared certain rates and limits of taxation as the constitutional limits and rates, providing at the same time a mode by which the legislature and the people might exceed them if they saw fit.

Any construction, which makes these constitutional restrictions dependent on legislative action, destroys their vitality. The legislature may not see proper to pass any laws affording an opportunity to the voters to increase the school tax to 100 per cent. in cities and towns, and 65 per cent. in county school districts; and, if it is conceded that the restriction to 4 mills on the dollar needs legislation to enforce it, because the process by which this rate of taxation may be increased does, then, in the absence of any legislation, there is no limit, and these provisions of the constitution are lifeless. After the 1st of July, 1877, the laws inconsistent with them are repealed; but, if no legislation occurs, and the position that legislation is needed to enforce the restriction is a correct one, then both the restriction and the proviso are inoperative, and the legislature may regulate the rate of taxation at their pleasure.

The legislature already possessed the power of limiting taxation to the maximum adopted in the constitution; but it was not the object or intention of the framers of the constitution to leave these limits to legislative discretion; but to

declare constitutional limits, which, until removed in the mode pointed out in the constitution, should prevail on its adoption. If the legislature and the people desire to increase this rate, a mode is provided by which it may be done; but, until this is done, the constitutional limit prevails.

The provision of the constitution required no legislation to enforce it, and, therefore, on the adoption of the constitution, went into effect. The proviso, by which a mode was appointed to alter it to a certain extent, and which depended on legislative action, does not prevent the restriction from going into effect.

The court is therefore of opinion, that the refusal of the county court to levy a tax beyond 4 mills on the one hundred dollars was right, and the mandamus applied for is therefor refused.

The other judges concur. Judges Vories and Wagner absent.

In The Matter of James L. Davis, Executor of the Estate of Charles B. Williams, deceased, Appellant.

1. *Administration—Annual settlements—Final settlement—Probate court, right of to examine and rectify prior settlements.*—Upon final settlement of an executor's accounts, the probate court has a right to examine the prior accounts and settlements, and rectify all mistakes therein.
2. *Administration—Money in hands of executor or administrator—When interest chargeable—Statute, construction of.*—Whether an administrator shall be charged with interest on money in his hands belonging to the estate, is to be determined by the circumstances of each case. (Wagn. Stat., 90, § 55.) Where the executor has let the money lie and heedlessly neglected to make it productive, the court may not visit him with a heavy penalty; but where he has used the money for his own purposes or for his own private gain, then the highest rate of interest allowed by the law may well be imposed. (Id., § 54.)
3. *Administration—Money in hands of executor—Interest charged.*—An executor at an annual settlement in 1871 showed some funds in his hands, and all debts proved up had been paid. At his final settlement, three years later, he made no further charge except for taxes and expenses of administration. It

appears, that after the settlement of 1871 the executor had mingled the money with his own; that he deposited it in bank to his own credit, and drew it out and used it as his own, and no reason was shown for the delay in making final settlement. The court, at final settlement, charged him with various items for which he had failed to account, and also with interest at eight per cent. from his settlement of 1871, with annual rests. *Held*, that the action of the court was right, and that the executor might well have been charged with ten per cent. interest.

Appeal from Daviess Circuit Court.

Rush & Davis, for Appellants.

I. The court should have ordered the distribution of the estate in 1871, at the very date from which it now charges interest on the executor by way of damages. The executor was not in default till the court ordered distribution. (Wagn. Stat., 111, § 3.)

II. But even if an order of distribution had been made, no right to impose eight per cent. interest, as damages for failure to comply therewith, would have followed. (Wagn. Stat., 112, § 10; Id., 109, 110, §§ 13, 14, 15.)

III. It is nowhere imposed by express statute as a duty on the part of the executors or administrators to invest the funds of the estate for the benefit of the estate.

The first and primary duty of the executor is to settle and wind up the affairs of an estate in a prescribed manner, and not to make favorable investments of the funds of the estate, and during this time the growth and increase of the estate are secondary considerations.

But if there is any duty in this direction at all, it ought to be laid with as much force and urgency upon the courts as upon the executor or administrator; the latter being the mere creature of the former. And yet this duty is only put upon the court as a discretionary matter. (Wagn. Stat., 90, § 57.)

IV. The right to charge the executor or administrator with interest proceeds upon the principle of profits to the executor or administrator, and not of making them account therefor by way of a penalty, and there is no finding in this case

that any profit was made by the executor by such use. The term used by the statute is, that the court shall exercise an "equitable control" in this matter, not an arbitrary will in the imposing of penalties.

The statute says, that if you do use it, the court shall exercise any "equitable control" thereover (Wagn. Stat., 90, §§ 54, 55), and that the court did not exercise nor assume to exercise such equitable control thereover is plainly evidenced by the decree itself, in which the court says, that eight per cent. interest is imposed by way of damages for default in failing to distribute the estate.

V. If the estate was entitled to any interest at all, it was entitled to only six per cent. In this State, when no rate of interest is agreed upon, six per cent. is the legal rate of interest.

M. A. Low, for Respondent.

I. All interest received by executors on debts due to the deceased is assets in their hands. (Wagn. Stat., 90, § 54.)

II. The court should have charged the executor with ten per cent. interest on the balance which he retained and used in his individual business after he ought to have made final settlement, and asked for an order of distribution. Such rate of interest was easily procurable by him. (Wagn. Stat., 90, §§ 4, 5.) Such a course on the part of an executor or administrator should not be made pleasant and profitable if the courts have the power to prevent it. (Hook vs. Payne, 14 Wall., 252; Schuffelin vs. Stewart, 1 John. Ch., 620; Trevis vs. Townshend, 1 Bro., 384; Raphael vs. Boehm, 11 Ves., 92.)

Wagner, Judge, delivered the opinion of the court.

The appeal in this case is from the finding and judgment of the probate court. The evidence is not embodied in the record, but the finding of the court, on which the judgment was based, is set out in detail. The circuit court confirmed the proceedings of the probate court, and the executor ap-

pealed. It appears, that on a final settlement of appellant's accounts, as executor of the estate of C. B. Williams, deceased, the court opened up the former annual settlements of the executor, and charged him with various items for which he had failed to account. The court also charged him with interest. The executor took out his letters in October, 1868. The annual settlements were made in 1869, 1870, 1871 and 1873. Final settlement was filed in 1874. The court found, that on the settlement in 1871, there was in the hands of the executor, belonging to the estate, $1,556.05, and that prior to that settlement all debts proved up against the estate had been paid, and that the only credits asked by the executor after that time were for taxes and expenses of administration; that prior to, and after the settlement of 1871, the executor had mingled the money belonging to the estate with his own money; that he deposited it to his individual credit in bank, and drew it out and used it as his own, and that no reason was shown for the delay in making final settlement. The court further found, that after the settlement of 1871, the executor had not been charged with any interest whatever on monies belonging to the estate in his hands, and therefore it charged him with the items for which he failed to account, and also with interest, at the rate of eight per cent. with annual rents from the settlement of 1871.

That the court had the right, upon the final settlement being made, to examine the prior accounts and settlements, and rectify all errors or mistakes that appeared therein, is too plain for argument, and has so often been decided in this court, that it is unnecessary to refer to the cases. The court found that the executor had wholly failed to charge himself, in his annual settlements, with certain debts which he had collected, and for monies which he had received for land sold; and it did entirely right to charge him with those items and interest thereon, under the circumstances developed in the case. At the settlement of 1871 there was a large surplus remaining in the hands of the executor, and the debts were all paid. Instead of obtaining an order of distribution

the executor kept the money, mingled it with his own, and used it for his own purposes. These are the facts and circumstances under which chancellors are in the habit of imposing on executors and administrators the highest rate of interest, frequently compounding it. Our statute declares, that all interest, received by executors or administrators on debts due to the deceased, shall be assets in their hands; and if they lend the money of the deceased, or use it for their own private purposes, they shall pay interest thereon to the estate. The further requirement is also made, that the court shall, at each settlement, exercise an equitable control in making executors and administrators account for interest received by them on debts due the estate, and for interest accruing on money belonging to the estate, loaned or otherwise employed by them. (Wagn. Stat., 90, §§ 54, 55.)

In the case of Madden vs. Madden (27 Mo., 544), it was held, that whether an administrator should be charged with interest on money in his hands belonging to an estate, was to be determined by the circumstances of each case. That adjudication seems to be a correct exposition of the 55th section of the statute which gives the court an equitable control over the matter. But the 54th section says, that where the executor or administrator uses the money for his own purposes, he shall be charged with interest. No rate of interest is designated; that will depend on the facts surrounding each case. Where the executor has let the money lie, and heedlessly neglected to make it productive, the court may not visit him with a heavy penalty; but where, instead of acting for the interest of the estate, he has used the money for his own purposes, or for his own private gain, then the highest rate of interest allowed by the law may well be imposed.

In the present case the executor kept the estate open and the money in his hands for three years after all the debts were paid, and used the money for his own private purposes; the court, we think, would have been well warranted in charging him with ten per cent. But it only charged him

with the eight per cent. with annual rests, and, under all the facts and circumstances, we do not think there was any indiscretion in exercising its equitable control.

The judgment is affirmed. The other judges concur; except Judge Vories, who is absent.

JOHN S. LOGAN, Respondent, *vs.* WILLIAM A. J. SMITH, AND SUSAN E. SMITH, Appellants.

1. *Bills and notes—Collateral security—Debt then created—Holder for value.*—One who takes a note as collateral security for a debt then created and on the faith thereof, with notice of no equities, becomes a holder for value.
2. *Mortgages—Note secured by transfer of—Release.*—The transfer of a note secured by mortgage carries the mortgage with it, unless the mortgage has been separately extinguished, as by a release for instance.
3. *Mortgages—Note secured by—Indorsee for value—What rights under the mortgage.*—The indorsee of a negotiable note, who takes it discharged of the equities to which it was subject in the hands of the payee, acquires the same right in a mortgage given to secure it, which the payee would have had, if no equities had ever existed against the note. (Linville vs. Savage, 58 Mo., 248, reviewed.)

Appeal from Buchanan Circuit Court.

A. H. Vories & W. S. Greenlee, for Appellants.

I. Mortgages are not governed by the same law as commercial paper, and the assignment of Smith's note by Cowan could not vest the plaintiff with any higher rights or stronger equity, in the mortgage given by Smith, than Cowan himself had; and if in his hands the mortgage was canceled, or could not have been enforced, neither could plaintiff enforce it. (Potter vs. McDowell, 43 Mo., 93–98; Linville, etc. vs. Savage, 58 Mo., 248–255; Shirm vs. Fredericks, 56 Ills., 439; Bailey vs. Smith, 14 Ohio St., 396; Craft vs. Bunster, 9 Wis., 503–8.)

II. The note of Smith being assigned to plaintiff as collateral security for the loan of $1.200, any defense against Cowan is available against his assignee. (Goodman vs. Simmonds, 19 Mo., 106; Potter vs. McDowell, 43 Mo., 93–98.)

John D. Strong, with Vinton Pike, for Respondent.

I. Plaintiff being a *bona fide* holder of the note and mortgage, evidence of any equities existing against Smith and Cowan in respect of this transaction is inadmissible. (Carpenter vs. Longan, 16 Wal., 271, and cases cited; 16 Wal., 468; 2 Pow. Mort., 973.) The authorities sustain this objection upon three grounds.

1. The mortgage follows the debt and partakes of its character. If the debt is negotiable, the mortgage must be. It is an inseparable incident of the debt. (Croft vs. Bunster, 9 Wis., 503.)

2. The mortgagee is a purchaser *pro tanto*, and may assign just as a fraudulent grantor of the fee may convey a valid title to an innocent purchaser. (Pierce vs. Farrar, 47 Me., 507.)

3. The mortgagor's contract is, that he will pay the note when it becomes due to any *bona fide* holder, without defense, and his property shall stand pledged for the fulfillment of that obligation. (Carpenter vs. Longan, *supra*.)

II. A mortgage has no separate existence and passes with an assignment of the debt. (Watson vs. Hawkins, 60 Mo., 554; McQuie vs. Peay, 58 Mo., 61; 2 Pow. Mort., 913.)

In Linville vs. Savage (58 Mo., 249), the point was not made by the assignees who asked a reversal of that case entirely upon other grounds.

Hough, Judge, delivered the opinion of the court.

This was a proceeding to foreclose a mortgage under the statute.

On the 17th day of January, 1870, Samuel F. Cowan sold and conveyed by warranty deed, to the defendant Smith, the land described in the mortgage sought to be foreclosed, for the sum of $3,000. The defendant paid $1,800 in cash, and for the remaining $1,200 made and delivered his negotiable promissory note of that date to said Cowan, payable on the 25th day of December, 1870, and to secure the payment of the same, executed said mortgage. At the date of

said sale, there was on record a mortgage on said land, made by Cowan on the 22d day of December, 1869, to one Floyd, from whom Cowan had purchased said land, to secure the payment of two notes of $770 each for unpaid purchase money, dated August 30th, 1869, and due respectively on the 1st day of March, and on the 25th day of December, 1870.

The defendant, Smith, had no knowledge of this mortgage at the time of his purchase, and he first learned of its existence on the 25th day of March, 1870, when Floyd notified him that Cowan had made default in the payment of his first note. Smith then saw Cowan, and it was agreed between them that Smith should raise $500, and Cowan should raise the balance necessary to pay off said note. In pursuance of said agreement, Smith paid $500 to Floyd on the 25th day of May, 1870, which was credited on Smith's note to Cowan; but Cowan failed to raise any money whatever. It was then further agreed between them, that Smith should become responsible on the Floyd notes to the extent of the balance on his note to Cowan for $1,200, not then due, and thus extinguish his indebtedness to Cowan. Cowan then stated to him that the mortgage had not been recorded, and should not be, but the note was not surrendered. Time was given on the balance of the first note, as is shown by the date of payment, and Smith subsequently paid the whole of the Floyd notes, and had satisfaction of the mortgage entered of record.

On the 9th day of August, 1870, the plaintiff, Logan, loaned to Cowan the sum of $1,200, taking a note from him therefor, and a transfer of Smith's note for $1,200 as collateral security, being informed by Cowan that it was secured by the mortgage before mentioned. This mortgage was never recorded, nor was it delivered to Logan, and it appears from the evidence to have been lost.

Soon after this transaction Cowan became insolvent. Smith was notified of the transfer of his note to the plaintiff, a short time prior to its maturity, and before any payments were made by him on the Floyd notes, other than that of $500 on May 25th, 1870, which was indorsed on the note; but as

we infer from the record, that Smith entered into some personal obligation to Floyd to the extent of his liability to Cowan, we shall not regard the payments thereafter made by him as affecting his rights. There was no evidence of any knowledge on the part of Logan, or of notice of any kind to him, of the arrangement made by Smith to discharge his debt to Cowan by paying the amount thereof to Floyd. The circuit court rendered judgment for the plaintiff on the note for the balance due and interest, and for foreclosure of the mortgage.

On the foregoing facts it is contended by the defendant, that the plaintiff was not entitled to judgment, first, because he could not be regarded as a *bona fide* holder of the Smith note, inasmuch as he took it as collateral security; and second, because the mortgage was not negotiable, and the plaintiff could not acquire by the simple transfer of the note any greater right to enforce the mortgage security than Cowan had.

Objection is made to the form of judgment, but we think it is without force.

In support of the first position, we have been referred to the case of Goodman vs. Simmonds (19 Mo., 106). That case goes only to the extent of declaring, that one, who takes negotiable paper as collateral security for a pre-existing debt, will hold it subject to all the equities existing between the original parties. It is otherwise in the case at bar. Logan took Smith's note as collateral security, not for a pre-existing debt, but for a debt created at the time, and on the faith thereof, with notice of no equities, and he thereby undoubtedly became a holder for value. (1 Pars. Notes and Bills, 224.)

The second point made by the defendant presents a more intricate question. The plaintiff had an undoubted right to collect the whole amount due on the note transferred to him by Cowan, regardless of the existence of any right in the defendant at the time of its transfer to have it discharged in the manner agreed upon between himself and Cowan.

The question presented is, whether by the transfer of the note the mortgage security held by Cowan also passed to the plaintiff, divested of all the equities existing between the original parties. The defendant contends on the authority of Linville vs. Savage (58 Mo., 248), that it did not.

It is well settled, that, unless the mortgage has been in some way separately extinguished, as by release for instance, the transfer of the note carries the mortgage with it as an incident. The mortgage itself is not a negotiable instrument, and cannot be transferred as such, but the indorsee of the note acquires a right to the security afforded by it by reason of the stipulation contained in the mortgage itself, that the property conveyed by it may be subjected to the payment of the full amount which the payee, or any indorsee, shall be entitled to recover as the holder of the note.

In the language of Justice Swayne, in Carpenter vs. Longan (16 Wal., 271–3), "the contract as regards the note was, that the maker should pay it at maturity to any *bona fide* indorsee, without reference to any defenses to which it might have been liable in the hands of the payee. The mortgage was conditioned to secure the fulfillment of that contract."

The plaintiff here, being unaffected by the agreement between Cowan and Smith, has the same right in the mortgage which Cowan would have had at the date of the transfer, if no such agreement had ever been made. To state the matter generally, the indorsee of a negotiable note, who takes it discharged of the equities to which it was subject in the hands of the payee, acquires the same right in a mortgage given to secure it, which the payee would have had, if no equities had ever existed against the note.

We do not understand the case of Linville vs. Savage to deny this. The spirit of that case is, that the indorsee for value, before maturity of a negotiable note, which was subject to no equities in the hands of the payee at the time of the transfer, cannot acquire any greater right in a mortgage, given to secure it, than the payee had. That is, if the land conveyed by the mortgage was subject to prior liens in favor

of a third party (which would constitute, of course, no equity as between the immediate parties to the mortgage), the indorsee of the note would only acquire the right to enforce his claim against the land, subject to such liens, whether he had notice of them or not.

In the present case, there are no equities affecting the character or value of the security itself, and the only question is, whether the security passed to the plaintiff as indorsee of the note.

In Linville vs. Savage, it was conceded that the security passed to the holder of the note, but the question was, how much security did the mortgage afford? Was it subject to a prior lien in favor of a third party as against the indorsee of the note?

If the land conveyed in the mortgage made by Smith to Cowan had been, at the institution of the present suit, subject to a vendor's lien in favor of Floyd, of which Cowan had notice, and the plaintiff had not, and the plaintiff was seeking to enforce his mortgage as a prior security, because he took without notice of such lien, the precise question passed upon in Linville vs. Savage, would be presented. Such, however, is not the case.

The plaintiff being a *bona fide* holder of the note in suit, and as such entitled to the benefit of the mortgage made to secure it, the judgment of the circuit court was right, and will therefore be affirmed. Judges Wagner and Napton concur. Judge Sherwood concurs in the result. Judge Vories absent.

JOHN P. WILLIAMS, ADM'R OF WILLIAM D. PETTICREW, Respondent, *vs.* THE HEIRS OF WILLIAM PETTICREW, Appellants.

1. *Administration—Annual settlements—Final settlements—Division of estate—Compromise.*—On appeal from a final settlement of an administrator mistakes in annual settlements can be corrected, and the fact, that the heirs compromised a suit as to the validity of the will on the belief that such annual statement was correct, cannot influence the action of the court. They might with other circumstances, have some weight to set aside the compromise.

2. *Administration—Final settlements—When to be assailed.*—Final settlements of administrators, curators, etc., must be seasonably and directly assailed in order to avoid their effect as judgments importing absolute verity.

3. *Administration—Final settlement—Estates of father and son.*—In a suit on the final settlement of A's estate, items allowed in the final settlement of the estate of B., father of A., by the same executor cannot be assailed, not being a matter before the court.

4. *Administration—Final settlement—Items questioned.*—In a suit on the final settlement of an administrator concerning certain charges it was *held:*

(*a.*) Where an administrator inventoried certain slaves, which were emancipated while in his hands, that he was not chargeable therefor.

(*b.*) Where the administrator under a power of attorney borrowed money for a trip for the deceased, that an itemized account of expenses, together with the balance in his hands should be filed; otherwise the claim should be disallowed.

(*c.*) Where the administrator in good faith and under advice of counsel took a trip to look after the estate, his claim should be allowed; where sufficient testimony, explanatory of such claim is not offered, the claim should be disallowed.

(*d.*) A claim for money paid as a penalty on taxes should be disallowed, when such penalty accrued by the administrator's neglect.

(*e.*) The time to obtain credit for worthless notes is at the final settlement, and the fact, that the administrator carried such notes on his annual settlements with no mention of their worthlessness, is not conclusive upon him, and the question, whether he exercised due diligence in collecting them, is a matter of fact to be determined by evidence.

(*f.*) If when the administrator receives a note, the makers thereof are solvent, but afterwards become insolvent, the burden of proof is on him to prove, that with due diligence he could not have collected it; and in the absence of such proof, the claim should be disallowed.

5. *Administration—Final settlements—Notes—Money—Interest, when chargeable.*—On notes in his hands bearing 10 and 6 per cent. interest, the administrator should be charged respectively such interest; on money in his hands legally accounted for, he should be charged such interest as he actually received when invested under the orders of the court; when such orders, if any, were departed from, then with such interest as he might have received if they had been complied with; on money in his hands not reported according to law, but used by him, he should be charged ten per cent. interest computed with annual rests; on notes properly returned as insolvent, he shall be credited with the principal and the same rate of interest with which he was charged thereon.

Appeal from Chariton Circuit Court.

A. S. Harris, with T. W. B. Crews, for Appellants, cited Williams Ex., 1567; Fish vs. Miller, Hoffm., Ch., 273; Wagn.

Stat., 875, § 26; Powell vs. Owens, 5 Ves., 839; Carter vs. Feland, 17 Mo.. 383; Johnson's adm'r vs. Hedrich, 33 Ind., 129; Garvin vs. Williams, 44 Mo., 465; S. C., 50 Id., 206; Witherspoon vs. McCalla, Wagner, 245; Powell vs. Evans, 5 Ves., 839; Case vs. Abeel, 1 Paige, 393; Piety vs. Stace, 4 Ves., 621; Hook vs. Payne, 14 Wall., 255; 1 John. Chan., 121; 1 Hilliard's Abr., 227–8; *In re* Van Horne, 7 Paige, 46; Waller vs. Amsted, 2 Leigh, 11; McCall vs. Peachy's Adm'r., 3 Munf., 288; Schiefflin vs. Stewart, 1 John. Ch., 620; 1 Amer. Lead. Ca., 523; Flintham's Appeal. 11 Serg. & Rawle, 16; Prewett vs. Prewett, 4 Bibb, 266; Darrell vs. Edw., 3 Dessaus, 241; Wagn. Stat., 90, §§ 55, 56 & 57; Id., 87, § 26; Id., 89, § 48; Id. 107, § 2; Hook vs. Payne, 14 Wall., 255, and cases cited; Toller's Ex., 480–1; Ashburnham vs. Thompson, 15 Ves., 402; 1 Bin., 199; 4 Serg. & Rawle, 116; 4 Hen. & Munf., 416; 4 John. Chan., Rep., 405; Fonblanque's Eq., 442.

Glover & Shepley, for Respondent.

I. David Petticrew bequeathed his property to his son, and Williams was his guardian. Williams took his ward into his house while an infant, and kept him tell he was of age and after. Immediately after the ward was of age, he being in a dying condition, Williams had a settlement with him and took his receipt. This settlement was invalid. (Revett vs. Harvey, 1 Sim. and Stu., 502; Mellish vs. Mellish, Id., 138; Garvin vs. Williams, 44 Mo., 465; S. C., 50 Mo., 206.)

II. It was a breach of trust to let a note, without real estate security, stand out. (Bentley vs. Shreeve, 2 Md. Ch., 215; Moore vs. Hamilton, 4 Fla., 112; Ruggles vs. Sherman, 14 I. R., 446; Shultz vs. Pulver, 11 Wend., 361; 2 Williams, Ex., 1539.)

III. If the administrator loaned the trust money without real estate security, he became liable therefor. (Powell vs. Evans, 5 Ves., 839; Gray vs. Fox, 1 Saxton, 259; Hemphill's Ap., 18 Pa. St., 303; 23 Pa. St., 44; Ackerman vs. Emott, 4 Barb., 626; Bogert vs. Vanvelsor, 4 Edw. 718.)

IV. If the administrator used the money of the estate himself and turned over this note instead, he made himself responsible for principal and interest. (Jacott vs. Emmett, 11 Paige, 142; Jenkins vs. Walter, 8 Gill and I. 218; Stantley's Ap., 8 Barr, 431; Morris vs. Wallace, 3 Barr, 323.) The administrator was bound to report money in his hands to the court and obtain its instructions. (Wagn. Stat,, 90.) He has no right to keep it dead in his hands. (2 Williams Ex., 1541.) Where there is so much confusion and so much neglect, the only safe rule is to make him account for ten per cent. compounded annually. (Hook vs. Payne, 14 Wall., 255; Spear vs. Tenkhorn, 2 Barb. Ch., 211; Clements vs. Caldwell, 7 B. Mon., 171; Swindall vs. Swindall, 8 Iredell Ch., 286; Moore vs. Beauchamp, 5 Dana, 77; Utica Ins. Co. vs. Lynch, 11 Paige, 520; Jameson vs. Hapgood, 10 Pick., 104; Barney vs. Saunders, 16 How., 535.)

V. The administrator is liable for a note, where no diligence is shown, no request to pay, and there was no proof of insolvency. (Wagn. Stat., 110, § 18; Williams Ex., 1536.)

VI. No probate court is authorized to lump a claim. It should be rejected, if not itemized. (Oldham vs. Trimble, 35 Mo., 229–230.)

VII. The account with the administrator should have been stated on the basis of ten per cent. with annual rests, in respect to every claim and use of money as to which he committed a breach of trust. (Wagn. Stat., 90, § 54.)

Thos. Shackelford, with C. A. Winslow, for Respondent.

I. On his final settlement, the administrator is entitled to credit for all debts due the estate, which have been charged in the inventory and have become insolvent, or which from any other cause he could not collect by the use of due diligence. (Wagn. Stat., 110, § 18; Strong vs. Wilkson, 14 Mo., 116.) His liability is like that of a bailee for him, and the measure of the diligence required of him is only that which prudent men exercise in the direction of their own affairs. (State vs. Maglen, 44 Mo., 356; Fudge vs. Dean, 51 Mo., 264; Gamble vs. Gibson, 59 Mo., 585.)

II. The administrator was bound to exercise reasonable diligence in collecting and preserving the estate, and his trip to Virginia under the circumstances was not an unreasonable undertaking. He was advised to go by his attorney and acted prudently in doing so. (Wagn. Stat., 84, § 184.)

III. A discretion is vested in trial courts as to charging an administrator with interest, and this court will not interfere, unless there has been an unreasonable exercise of this discretion. (Wagn. Stat., 90, §§ 54, 55; Madden vs. Madden, 27 Mo., 544; Clyce vs. Anderson, 49 Mo., 37.)

Hough, Judge, delivered the opinion of the court.

Dr. David Petticrew died in 1847, leaving a will, by which he devised and bequeathed to his only child, William D. Petticrew, his entire estate. John P. Williams was appointed and qualified as executor of said will, and qualified also as testamentary guardian of the person and curator of the estate of said W. D. Petticrew. On the 12th day of September, 1860, W. D. Petticrew became of age. On the 13th or 14th day of the same month, Williams made a final settlement of his accounts as executor, guardian and curator. On the day after the settlement W. D. Petticrew made a will, giving therein a large portion of his estate to his guardian, Williams, and to Williams' children.

In November, 1860, Petticrew died, and in January, 1861, Williams was appointed administrator of his estate with the will annexed. In April, 1863, proceedings were instituted by the heirs at law of Petticrew to contest the validity of his will, and said proceedings were twice reviewed by this court, without any final determination of the cause (44 Mo., 465 and 50 Mo., 206.) In November, 1872, said proceedings being still pending, a compromise was effected between the heirs at law, and the claimants under the will, whereby they agreed to make an equal division between them of the property of the estate, and the further contest of the will was abandoned. Under the arrangement, it is stated, the real property has been divided. One of the stipulations of the compromise was as

follows: "Fifthly. The said parties of the second part (claimants under the will), in consideration of the premises, and the further consideration of five dollars to them paid by the parties of the first part (heirs at law), the receipt of which is hereby acknowledged, covenant and agree with the parties of the first part, that they, the said parties of the second part, will fully account for and pay over and cause to be paid over to the said parties of the first part, their heirs and assigns, the equal half of the present estate, money, goods, chattels, rights, credits, rents and effects above conveyed to them, with interest accruing, if any, for which an account shall lawfully be rendered by the proper party or parties. The said account to be taken and rendered, and the said one-half to be paid over to the parties of the first part, to be enjoyed according to their respective interests as heirs at law and distributees of said William D. Petticrew, deceased, in the same manner, and with like effect, as if said William D. Petticrew had died intestate, or his alleged will had been set aside and annulled. The aggregate amount of the said one-half of the said personal estate shall be ascertained amicably by the counsel of the respective parties upon an investigation of the value of said estates of David Petticrew and William D. Petticrew, lawfully to be accounted for; and the parties of the first and second part agree with each other to facilitate such investigation, by placing promptly in the hands of said counsels all books, papers, accounts, documents and information in their possession, when called for, and the amount when so ascertained shall be promptly paid over, or secured to the satisfaction of the parties of the first part, and if said amount to be so accounted for and paid over cannot be amicably agreed upon, the same may be adjusted by suit or suits in the courts."

On the 5th day of August, 1863, Williams, as administrator, filed an exhibit of the estate of William D. Petticrew, showing the aggregate amount of notes, judgments and cash on hand to be $28,361.54. Accompanying the statement was a list of notes returned as insolvent in his settlement

made in 1860, and a schedule of all the real estate and other property belonging to the estate. A second statement, or settlement, was made July 11th, 1867, showing a balance on hand of $30,569.45. A third settlement was made on the 15th of April, 1868, showing a balance on hand of $29,872.56. On the 16th December, 1869, a fourth settlement was made, showing a balance on hand of $28,866.13.

After the compromise was entered into, Williams filed an exhibit and statement as and for a final settlement of the estate of W. D. Petticrew, which showed a balance on hand to December, 1872, of $16,544.13, he having claimed credit for a number of notes as worthless, and uncollectable, with which he stood charged in his previous settlements.

On the 27th day of August, 1873, this final settlement, together with the objections thereto filed by the heirs at law of W. D. Petticrew, were submitted to the Judge of the probate court of Chariton county, who took the case under advisement, and on the 14th day of October, 1873, he rendered judgment charging the administrator with the sum of $56,175.54, and ordered distribution thereof.

From this judgment the administrator appealed to the circuit court, where on the 27th day of November, 1873, upon a trial *de novo*, the administrator was charged with the sum of $19,918.92, and judgment was entered accordingly, and distribution was ordered according to the respective rights of the parties, as settled and determined by the agreement of compromise. From that judgment the heirs have appealed to this court.

In November, 1861, all the records and papers in the county clerk's office of Chariton county, including the settlements of John P. Williams, as executor of David Petticrew, and as guardian and curator of W. D. Petticrew, were destroyed by fire. These settlements, therefore, could not be introduced in evidence to show what money, notes, accounts, and other property constituted the estate of Wm. D. Petticrew at the time those settlements were made. Whether any annual settlements were made by Williams, prior to

1863, does not appear. The statement of August, 1863, was made in consequence of the loss of the probate records, and was intended to be a complete exhibit of the condition of W. D. Petticrew's estate; and on this and on the annual settlements subsequently made, the appellants here assert that they based their compromise with the administrator and other claimants under the will, and they therefore insist that to allow any correction or change in such settlements, as will diminish the administrator's liability to any extent, will operate as a fraud on them.

In a proceeding to rescind or set aside the agreement of compromise, such an argument might, in connection with other circumstances, have some weight; but it is utterly without force on an appeal from the final settlement.

In making his final settlement after the compromise, the administrator had precisely the same rights he would have had if no such agreement had been made; and in view of the allusion by counsel to certain circumstances, which they claim affected the validity of the settlements made in 1860, soon after W. D. Petticrew attained his majority, it may be proper to remark, that neither the probate nor the circuit court had any concern with these settlements in adjusting the final settlement now under review, further than to ascertain, as far as was pertinent, what those settlements were. The present proceeding does not involve the legality or good faith of any allowances then made. Such settlements must be seasonably and directly assailed, in order to avoid their effect as judgments importing absolute verity.

This case was tried in the circuit court, on exceptions filed in the probate court, and our inquiries must be confined to the matters there decided. The administrator, Williams, must be held to bear precisely the same relation to the property which came to his hands as administrator of William D. Petticrew, which he would sustain, if another, than himself, had been executor of David Petticrew, and guardian of William D. Petticrew, and made the final settlements in 1860. His duty as to the collection of the notes and accounts,

and the preservation of the entire estate of William D. Petticrew, his liability for interest, and his right to receive credit for insolvent notes, are just the same as they would be, if he had never had any connection with the settlements made in 1860. The credits allowed to Williams in his final settlement of David Petticrew's estate for notes on insolvent persons, returned by him as uncollectable, which allowances were objected to by the appellants, cannot be examined here. That settlement is not before us. When these notes again came to Williams' hands as administrator in 1861, some of them were barred and others were uncollectable, and we think the credits allowed him on account thereof were justified by the evidence.

Objections were made to a number of vouchers in the probate and circuit courts which have been abandoned here. The examination of the manuscript record of two hundred pages, now before us, has been no easy task. It is not very orderly in its arrangement and we have received very slight assistance from the briefs of counsel, for want of proper references to those portions of the record where the matters relied upon are to be found.

The following credits allowed to the administrator by the circuit court, against the objections of appellants, are still objected to.

In the settlement made in 1863, a note to Thos. Lowry, dated Nov. 8th, 1860, for $735, due ten months after date, bearing interest at ten per cent. signed Wm. D. Petticrew, per John P. Williams.

A bond to B. F. Wood, dated Nov. 28th, 1860, for $600, due one day after date with interest at ten per cent., signed W. D. Petticrew, by John P. Williams, agent.

A note from Mrs. Lyford for $200, dated September 22, 1860, payable January, 1862, to William D. Petticrew.

Expenses of a trip to Virginia to look after the interest of Petticrew in some estate there, $175.

Account of J. R. Hyde & Co., $115.40.

In the settlement made in 1869, an allowance of $100 for services in looking after the lands of the estate.

In the settlement made in 1869, an allowance of $271.70, over and above taxes proper, paid as penalty and costs to redeem lands of the estate sold for taxes.

In the final settlement, credit for the note of James A. Clark for $269.52, due May 23, 1856, bearing ten per cent.; and a note of John W. and James S. Gilliam, for $5,684.81, due July, 26th, 1860, with ten per cent. interest.

Objections were also made to an allowance for taxes paid after the final settlement was filed, for the years 1872 and 3. These taxes were a lien on the estate before any division under the compromise, and we can see no objection to the allowance.

An attempt was made to show the value of the slaves inventoried by the administrator and emancipated while in his possession, with a view of charging him with the amount. The circuit court very properly refused to hear any testimony on the subject.

The notes to Wood and Lowry were for money, borrowed by Williams under a general authority by power of attorney from Wm. D. Petticrew, to defray the expenses of a trip to the south, advised by the physicians of Petticrew to be taken for the benefit of his health, and during which trip he died. An itemized account of the expenses of that trip should have been required of the administrator together with an account of the balance in his hands, otherwise these credits should not have been allowed.

The expenses attending the trip to Virginia to look after the interests of the estate constituted a proper credit to the administrator. It seems to have been undertaken by the advice of counsel and in good faith. The fact, that the administrator was himself interested as legatee, does not detract from the merit of the claim. Other persons were likewise interested in the estate under the will.

We see no objection to the credit allowed for the note of Mrs. Lyford. This note was taken by Petticrew himself after the statement in 1860. She was insolvent at the time and continued so until her death, and the note was probated against her estate, but nothing was ever realized.

No objection is urged in this court to the account of Hyde & Co.

We cannot say from the testimony before us, whether the allowance for looking after the lands of the estate was proper or not. In the absence of sufficient testimony, the exception must be sustained. The sum allowed for the redemption of lands in Livingston county, in excess of the original taxes, should not have been credited to the administrator. It was through his neglect that it became necessary to pay the sum, and he should be required to bear the loss himself.

The fact that the notes of James A. Clark and John M. and Jas. S. Gilliam were returned by the administrator as part of the assets of the estate in all his settlements from 1861 to his final settlement, without any mention of the insolvency of the makers, is not conclusive evidence, that they could have been collected by him by the exercise of due diligence. By the provisions of our administration law, neither inventories nor appraisements are conclusive for or against an administrator, nor are annual settlements. Besides the time, fixed by the statute for obtaining credit for insolvent notes, is at the final settlement. And the appellants could not complain, even in a proceeding where they might be properly heard on that subject, of having been deceived solely by the annual settlements of the administrator into making the compromise they did, as they were bound to take notice of the law and the rights of the administrator thereunder. The question, therefore, is one of fact, as to whether it was possible for the administrator by the exercise of due diligence to have collected these notes at any time after he entered upon the administration of W. D. Petticrew's estate in January, 1861. For any failure or default in that regard, prior to that time, he is not accountable in the present proceeding.

In regard to the Clark note, the testimony is conclusive, that from the time this note came to the hands of Williams, as administrator, in 1861, Clark was and continued to be insolvent. We have no doubt about the propriety of allowing the administrator credit for this note.

In regard to the Gilliam note, there is more doubt. When this note was turned over to W. D. Petticrew after the settlement in 1860, the makers were undoubtedly solvent. This note again came to the hands of Williams, as administrator, in January, 1861. In March or April, 1861, John and James Gilliam suddenly became insolvent, and since that time it has been impossible to collect the note. In March, 1861, Williams secured, by a land trade, a debt due to the estate, together with one due to himself, from James S. Gilliam, who was surety for John Gilliam on the note for $5,684.81. James Gilliam testified, that he owed the Petticrew estate about $2.000, and Williams about $1,000, and that he sold his land to Williams for $4,000 and received from him $1,000 in cash. Williams had several interviews with him about the note of John Gilliam, on which he was surety, but he refused to pay it. After that time it could not have been made out of him by law. There was some testimony, that Williams went to John Gilliam's house at night together with one Sportsman, and perhaps an officer, to have him secure a debt due to himself and Sportsman, but the date of this occurrence was not given, and what was done, does not clearly appear. It is difficult to determine from the testimony now before us, whether Williams should have been credited with this note. From the time he became administrator, until the insolvency of the Gilliams, he must undoubtedly have felt a personal interest, as a legatee under Petticrew's will, in the collection of this debt; but we cannot say that he exercised that diligence which the law exacted of him as administrator. Neither can we say, that it appears from the evidence that by the exercise of any degree of diligence, the debt could have been collected. But as the burden of proof was on the administrator to establish his right to credit for this note, he should at least have made it appear, that even by the exercise of a proper degree of diligence it would have been impossible to collect it. On the testimony adduced, the exceptions of the heirs should have been sustained. As the case must go back for a statement of the administrator's account

in accordance with this opinion, this matter may be made plainer by further testimony.

On the note for $12,521.00, given by Williams to W. D. Petticrew on the final settlement had with him September, 13th, 1860, the circuit court only charged him with ten per cent. simple interest. When Williams entered upon this administration of Petticrew's estate in January, 1861, the debt represented by this note became assets in his hands. It appears from the record, that he did not report the proceeds of this note to the court as required by the statute, but on the contrary mingled this money with his own and used it for his own benefit in his own affairs, and that he neither did nor could render any separate account thereof. Under such circumstances we think the probate court did right in charging him with compound interest, and the circuit court erred in charging him with simple interest only.

On the notes in his hands bearing ten per cent. interest the administrator should be charged with ten per cent. On claims bearing 6 per cent. he should be charged the same rate. On money in his hands legally accounted for, he should be charged such interest as he actually received when invested under the orders of the court; and when such orders, if any, were departed from, then with such interest as he might have received if they had been complied with.

On money in his hands not reported according to law, but used by himself, he should be charged with ten per cent. interest, computed with annual rests. As to the notes which we have indicated were, in our opinion, properly returned as insolvent, he should be credited with the principal thereof, and the same rate of interest with which he was charged on said notes up to his final settlement. The rule laid down in Gamble vs. Gibson (59 Mo., 585) can be applied to the transaction in gold.

The judgment of the circuit court will be reversed, and the cause remanded. Judges Napton, Vories and Sherwood concur; Judge Wagner absent.

LYMAN B. STIVERS, Defendant in Error, *vs.* JOHN T. HORNE, *et al.*, Plaintiffs in Error.

1. *Fraudulent conveyances—Deed to wife—Embarrassed debtor.*—A deed to his wife made by a man, who at the time is largely indebted or in greatly embarrassed circumstances, will be set aside in favor of his creditors.
2. *Practice, civil—Record—Demurrer, disposal of—Jeofails, statute of.*—The record in a suit showed no formal decision of a demurrer, and no judgment thereon; the bill of exceptions showed that it was overruled and default taken for failure to answer. The demurrer was frivolous. After demurring, the defendants so doing seem to have abandoned the case. *Held*, those defendants were not damaged; that the statute of jeofails cured the defect.
3. *Practice, civil—Pleadings—Issues—Amendments—Reversal—Statute, construction of.*—In a suit to set aside a deed for fraud, a party was made defendant on his own motion, and by his answer and the reply an issue as to notice to him of the fraud was raised. *Held*, that an objection, that the petition did not charge notice to him, is untenable in this court. (Wagn. Stat., 1034–7, §§ 5, 6, 19, 20; Id., 1067, § 33.)
4. *Conveyances—Quit-claim—Innocent purchaser—Execution sale—Deed, suit to set aside.*—In a suit to set aside a deed for fraud by a purchaser of the grantor's interest at an execution sale, one, who purchased by quit-claim deed (Ridgeway vs. Holliday, 59 Mo., 444) several months after the execution sale, cannot claim to be a purchaser without notice.
5. *Homesteads—Debts anterior to acquisition of.*—A claim of homestead exemption will not avail against debts created prior to the acquisition of the land sued for. (Farra vs. Quigly, 57 Mo., 284.)

Error to Atchison Circuit Court.

John P. Lewis, for Plaintiffs in Error.

I. No judgment could be rendered till the demurrer was disposed of.

II. The petition below did not charge any knowledge on Lewis' part of the fraudulent practices of the other defendants. (King vs. Hudson R. R. R. Co., 2 Kern. [N. Y.], 119; Frazer vs. Roberts, 32 Mo., 457; Saufer vs. Saufer, 40 Mo., 160; Knox vs. Smith, 4 [U. S.], 298.)

III. The property in dispute was a homestead, acquired by the sale of a homestead, and was exempt from execution, and the sale could not be fraudulent as to creditors. (Cox vs. Wilder, 2 Dill. C. C., 46; Vogler vs. Montgomery, 54 Mo., 577; Buck vs. Ashbrook, 59 Mo., 200.)

IV. A conveyance from husband to wife is not of itself fraudulent as to creditors. It must deprive them of some means of obtaining their debts which existed before the conveyance, or have been made with fraudulent intent. (Eaton's Adm'r vs. Perry, 29 Mo., 96; Sexton vs. Wheaton, 8 Wheat., 229; Payne vs. Stanton, 59 Mo., 158.)

Bennett Pike, with Durfee & McKillop, for Defendant in Error.

I. Horne being insolvent at the time of the purchase of the land, and having purchased with his own means, the deed, therefore, to his wife was a fraud in law. (1 Sto. Eq., § 359; Potter vs. McDowell, 31 Mo., 62; Pawley vs. Vogel, 42 Mo., 291.)

II. Lewis is not an innocent purchaser as he claims under a quit claim deed. (Ridgeway vs. Holliday, 59 Mo., 444.)

SHERWOOD, Judge, delivered the opinion of the court.

Plaintiff, who is a judgment creditor of defendant, John T. Horne, brought his suit against the latter and wife to set aside a conveyance made to the wife, on the ground that such conveyance was made to hinder, delay and defraud the creditors of Horne. The petition also prayed injunctive relief with regard to the rents and profits of the premises in dispute, then in possession of a tenant of the wife.

The defendants, Horne and wife, who were non-residents of the State, appeared by attorney and filed a demurrer. Afterwards, the defendant, John P. Lewis, on his own application, was made party defendant, and filed a general denial of the material allegations of the petition, and claimed in his answer that he was a purchaser in good faith and without notice.

The temporary injunction called for, was denied; but upon a final hearing of the case on the merits, the decree went in favor of the plaintiff, he being a purchaser at execution sale of defendant Horne's interest in the land in controversy.

I.

It is wholly unnecessary to discuss the evidence at length. Its careful perusal has satisfied us beyond doubt, that the

conveyance sought to be set aside was made in fraud of creditors, or else by a party largely indebted at the time, in greatly embarrassed circumstances, if not actually insolvent, when the conveyance in question was made. Our conclusion on this point, for these reasons, coincides with that of the circuit court.

II.

It is, however, objected, that the record does not show that the demurrer was disposed of. Although there is no formal disposition of the demurrer, no judgment entered thereon, yet the bill of exceptions shows that the demurrer was overruled, and that a default was taken for failure to answer; and the defendants, Horne and wife, seem, after having demurred, to have abandoned the cause, which was thereafter actively participated in by the defendant Lewis alone. There was no ground for demurrer to the petition; it made the usual allegations, and the demurrer was merely frivolous.

In consequence of this, the defendants, who demurred, cannot be said to have been prejudiced by the mere failure to take formal action on their demurrer, by an appropriate entry. Our statute of jeofails is applicable to, and cures, a defect of this sort.

III.

Another objection, equally futile, is, that the petition is faulty in not charging notice of the fraud, etc., on Lewis. The petition was not framed with the view of making him a party, but an issue as to notice was raised expressly by the answer and denied by the reply, and this accomplished all that could have been done by an amendment of the petition. (Wagn. Stat., 1034, *et seq.*, §§ 5, 6, 19, 20; Id., 1067, § 33.) There is therefore no room for complaint on this score.

IV.

But Lewis was not a purchaser without notice. The evidence shows this very clearly. In addition to that, he held only by quit-claim deed (Ridgeway vs. Holliday, 59 Mo., 444); and that deed and the purchase, which it recites, were made months after plaintiff bought at execution sale.

V.

This being an equity case, we shall not discuss the instructions given or refused, and as to the question of a homestead, in the premises in dispute, there was no evidence showing that Horne and wife had a homestead there at any time, and more especially at the time of the sale at which plaintiff acquired title. And even if there were evidence of this character, still it could not avail anything, as it is shown that the debts, for which plaintiff's judgment was rendered, accrued anterior to the acquisition of the land sued for. (Farra vs. Quigly, 57 Mo., 284.)

It results that the judgment of the lower must be affirmed. Judges Vories and Wagner absent. The other judges concur.

PATRICK S. KENNEY, Respondent, *vs.* THE HANN. & ST. JO. R. R. Co., Appellant.

AND

ASA H. GURNEY Respondent, *vs.* THE HANN. & ST. JO. R. R. Co., Appellant.

1. Wilson vs. Kansas City, St. Jo. & C. B. R. R. Co. (60 Mo., 184), affirmed.

Appeal from Grundy Circuit Court.

James Carr, for Appellant.

I. The acts of the State of Missouri, which prohibited railroad companies from transporting Texas cattle into the State, are repugnant to the U. S. Constitution, Art. 1, § 8. (Canfield vs. Coryed, 4 Wash. C. C.. 371: 2 Sto. Const., 4 ed., §§ 1056–1076; Gibbons vs. Ogden, 9 Wheat., 1; Alina vs. California. 24 How., 169; Crandall vs. Nevada, 6 Wall., 35; Woodruff vs. Parham, 8 Wall.. 123; Huison vs. Lott, id., 148; Ward vs. Maryland, 12 Wall., 418; R. R. Co. vs. Penn, 15 Wall., 232; R. R. Co. vs. Richmond, 19 Wall.,

589; Passenger cases, 7 How., 464; Gilman vs. Philadelphia, 3 Wall., 713; Welton vs. State of Mo., U. S. Sup. Ct., March term, 1876.)

Shanklin, Low & McDougal, for Respondent.

I. The act regulating the introduction of Texas cattle is a police measure, and is in no sense a direct or indirect attempt to regulate commerce. (R. R. Co. vs. Fuller, 17 Wall., 560; Yeazel vs. Alexander, 58 Ill., 254; License Tax cases, 5 Wall., 462; Slaughter House cases, 16 Wall., 62; Gibbon vs. Ogden 9 Wheat., 1; City of New York vs. Miln, 11 Pet., 102; Holmes vs. Jennison, 14 Pet., 616; License Tax cases, 5 How., 577, 589; U. S. vs. Dewitt, 9 Wall., 41; City of St. Louis vs. Boffinger, 19 Mo. 13; Varick vs. Smith, 5 Paige, 160; Thorpe vs. R. & B. R. R. Co., 27 Vt., 149; Stuyvesant vs. Mayor of New York, 7 Cow., 604; Cooley Const. Lim., 584; Pott. Dwar. Title Pol. Reg.; Wilson vs. K. C., St. Jo. & B. R. R. Co., 60 Mo., 184.)

II. The court will give such a construction to an act as to uphold the law if possible. (State *ex rel.* Weir vs. County Judge of Daviess County, 2 Ia., 280; License Tax Cas., 5 How., 540.)

WAGNER, Judge, delivered the opinion of the court.

These two cases were submitted together, and both involve the same questions.

The actions were originally instituted against the defendant for bringing Texas cattle into this State, contrary to the provisions of the statute, in consequence of which plaintiffs' cattle became diseased, and sick, and died. In the court below plaintiffs had judgment, and the defendant appealed. The defendant makes but one point upon this appeal, and that is, that the law of this State, under which the actions were brought, is unconstitutional. This precise and identical question was examined and passed upon in this court, in the case of Wilson vs. St. Joseph & Council Bluffs R. R. Co. (60 Mo., 184), where it was held that the law now brought in

question was valid. That case is decisive of, and determines these.

Judgment of affirmance will therefore be entered in both cases. All the other judges concur, except Judge Vories, who is absent.

WARREN D. CRANDALL, Respondent, *vs.* J. S. COOPER and A. C. CLARK, Appellants.

1. *Mechanics' liens—Prior incumbrance, sale under—Subsequent sale under the lien—Buildings—Statute, construction of.*—Land was sold under an incumbrance, and subsequently sold under a mechanic's lien for work begun subsequent to the origin of the incumbrance. *Held*, that the first sale released the land from the mechanic's lien, but that the purchaser at the execution sale under the mechanic's lien might have bought the erections and improvements free from all liens. (Wagn. Stat., 907, *et seq.*)

Appeal from Linn County Common Pleas.

S. P. Huston, for Appellants.

I. The appellant was not a party to the suit to enforce the mechanic's lien, and therefore was not bound by it. (Wagn. Stat., 910, § 9.)

II. The trust deed under which appellant claimed, was the prior lien. (Wagn. Stat., 908, § 2; Houck Liens, 1-144, ch. 6.)

III. The lien of the mechanic as against the appellant only attached to the erection, the fence, and he could remove it from the premises. (Wagn. Stat., 908, § 3.)

George W. Easley, for Respondent.

If the plaintiff was not entitled to recover the possession of the property, he was entitled (Wagn. Stat., 560, § 14), to payment for the rents and profits.

WAGNER, Judge, delivered the opinion of the court.

This was an action of ejectment to recover possession of a lot of ground in the town of Brookfield. The answer ad-

mitted the possession, but denies all the material allegations of the petition.

The plaintiff claimed under a sheriff's deed, dated the 6th day of August, 1873, and which recited a judgment for $28.09 recovered by one M. L. Delano on the 11th day of August, 1871, against J. S. Cooper and Fletcher and wife, the latter being Cooper's vendees. The judgment and execution were special, reciting a mechanic's lien, and ordering its enforcement against the lot in dispute.

Plaintiff then read in evidence the original papers in the case of Delano against Cooper and Fletcher and wife, which showed that the work, for which the lien was claimed and enforced, was commenced on the 10th day of July, 1870, and was done in putting up a fence along the street front of the lot. The rents and profits were then shown, and plaintiff rested.

Defendants on their part, read in evidence a deed of trust executed by J. S. Cooper and wife, on the 20th day of April, 1870, which was recorded on the next succeeding day, conveying the premises sued for to plaintiff, W. D. Crandall, as trustee, to secure the payment of a note to defendant, Clark, for the sum of eleven hundred and eighty-eight dollars. They also read in evidence a deed under the deed of trust made by Crandall, the plaintiff, as trustee, reciting the non-payment of the note, the sale and purchase of the property by the defendant, Clark, and the conveyance of the same to him. This was all the evidence, and the court found for the plaintiff.

It will be seen by the above recited facts, that Clark's lien was prior to the commencement of the work and to the filing of the mechanic's lien and the proceedings thereon. Clark was not a party to the suit, but his own trustee, the plaintiff, purchased at the sale, and now seeks to recover the premises for himself, the record showing that he bid two dollars and fifty cents as the consideration.

By the second section of the mechanic's lien law (Wagn. Stat., 908) it is provided, that the entire land, which is pre-

viously referred to, upon which a building, erection or other improvement is situated, including as well that part of the land which is not covered with the building, erection or improvement, as that part thereof which is covered with the same, shall be subject to all liens created by the statute, to the extent, and only to the extent, of all the right, title and interest owned therein by the owner or proprietor of the building, erection or improvement, for whose immediate use or benefit the labor was done or things were furnished. The third section enacts, that the lien for the things aforesaid, or work, shall attach to the buildings, erections or improvements, for which they were furnished or the work was done, in preference to any prior lien, or incumbrance or mortgage, upon the land upon which the buildings, erections, improvements, or machinery have been erected or put; and any person enforcing such lien may have such building, erection or improvement sold under execution, and the purchaser thereof may remove the same within a reasonable time thereafter.

The 14th section provides, that, in all suits under this law, the parties to the contract shall, and all other persons, interested in the matter in controversy and in the property charged with the lien, may, be made parties; but such as are not made parties shall not be bound by the proceedings.

As Clark was not made a party to the proceedings for the enforcement of the mechanic's lien, he was a stranger to them, and they have no force or effect upon him. The second section of the law only gives the lien to the extent of the interest owned by the proprietor, and as the interest of Cooper, the proprietor, at the time the lien attached, was subject to Clark's prior lien, the mechanic acquired no greater interest in the realty than his immediate contractor, Cooper, possessed, viz: the equity of redemption, or a right to the premises after the trust lien was paid off. But Clark having bought under this prior lien, his rights are paramount to any interest obtained under a sale upon the mechanic's lien which was subsequent in date. By the third section the purchaser might have bought the erections and improvements

freed from all liens, and would have been entitled to recover them, and this is all that he could have acquired.

Wherefore, the judgment must be reversed, and the cause remanded. All the other judges concur, except Judge Vories, who is absent.

WILLIAM J. BIGGERSTAFF, Respondent, *vs.* BENJAMIN HOYT, *et al.*, Appellants.

1. *Equity—Injunction—Judgments, fraudulently assigned.*—A. alleged and proved, that a judgment was obtained against B., himself and another as sureties on B.'s bond; that B. was heavily indebted and that proceedings in bankruptcy were begun against B., but they were dismissed on the agreement of C., a creditor of B., with the judgment creditor and A. to pay the judgment, having it assigned to him, and only to enforce it against B.; that the judgment was assigned to C., who ordered the sheriff to return the executions unsatisfied; that then the judgment could have been made out of B.; that C. caused B.'s property to be attached for his other claims and certain other debts; and subsequently assigned the judgment to other parties, who knew all the facts; that executions were then issued on the judgments; that B. and the other surety had become insolvent. *Held*, that A. was entitled to an injunction to restrain the sale of his property under that execution.
2. *Equity—Evidence—Oral testimony—Suspicious circumstances—Supreme Court.*—Where in an equity case the respondent's testimony was direct and positive, and well sustained all his material averments, while the appellants' testimony was not so satisfactory, and their actions were surrounded by suspicious circumstances and strongly tended to corroborate respondent's allegations, and most of the testimony was oral, this court will not disturb the finding.

Appeal from Buchanan Circuit Court.

Zimmerman, with Pike & Pike, for Appellants.

Loan & Ramey, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

This was an application for an injunction to restrain the sale of certain real property belonging to the plaintiff.

The petition stated, that at the May term, 1873, of the Buchanan county circuit court, there were two judgments

rendered against Hannah Thornton, and one Day and the plaintiff, who were securities on her appeal bond; that the judgments were in favor of Henry Hoyt, but that they were managed, controlled, and really owned by the defendant, Benjamin Hoyt; that after the judgments were rendered, the defendant Hoyt who managed, controlled and owned the judgments, and knew that they were rendered against the plaintiff as security on the appeal bond, agreed with plaintiff that he would have executions issued and levied on the property of the said Hannah Thornton; that in pursuance of the agreement, executions were issued and placed in the hands of the sheriff with instructions to make the money out of her property; that at the time there was sufficient property belonging to her to pay off and satisfy the executions; that she owned a large amount of property, personal and real, of the value of fifteen thousand dollars, and that the judgment would have been satisfied by the enforcement of the executions but for the fraudulent acts of the defendant Hoyt, and one James Sloan.

It is further alleged, that at that time James Sloan had a deed of trust on the property of Hannah Thornton, which trust deed was not four months old, and that Hannah was indebted to defendant Hoyt in a large sum of money on open accounts, over and above the judgments; that being security on the bonds, for which the judgments were rendered, he would have paid them off and proceeded to collect them of Hannah, but for the agreement of Hoyt to issue, and the issuing of, the executions to make the money out of Hannah's property; that at the time, Sloan, having the deed of trust on the property of Hannah and she being indebted to defendant, Hoyt, in a large sum of money, over and above the judgments, on open accounts, it was determined by Hoyt, defendant, to put Hannah into bankruptcy, and to buy in the property fraudulently held by the Sloan deed of trust and subject it to the payment of Hannah's debts; that for this purpose the proceedings in bankruptcy were commenced by Hoyt, and that Sloan's deed of trust was fraudulent and was

for eight thousand dollars, and Hannah's property was worth fifteen thousand dollars; that Sloan agreed with Hoyt and the plaintiff, that, if the proceedings in bankruptcy were stopped, he would pay off and discharge the judgments, as well as all other indebtedness which Hoyt had against Hannah, and that he would look to her for the payment of the same, and that he would have the judgments assigned to him, and hold them satisfied as to the plaintiff and as an additional lien against Hannah's property; that in pursuance of said agreement, Hoyt stopped the proceedings in bankruptcy, and that Sloan paid to Hoyt the amount of the judgments and all other claims which he held against Hannah including the expenses incurred in the bankrupt proceedings; that Hoyt assigned the judgments to Sloan to enable him to collect them from Hannah, and that plaintiff, relying upon the fulfillment of the contract and upon the assurances made that the judgments were satisfied as to him, paid no further attention to them or to their collection; that Sloan with a full knowledge of all the facts above recited and set forth, ordered the sheriff to return said executions not satisfied, and they were accordingly so returned; that at the time the executions were so returned by Sloan's order, he know where there was sufficient property to have satisfied them, belonging to Hannah, the principal debtor; that Sloan sued out attachments against Hannah's property and made certain other debts, but held up the judgments and then fraudulently assigned them to one Zimmerman, Hannah's attorney, who took them with a full knowledge of all the facts and agreements between the parties, and that Zimmerman, in furtherance of a fraudulent conspiracy entered into between him and Sloan and the defendant Hoyt to defraud and cheat the plaintiff, assigned and transferred the judgments to the defendant, who took them with a full knowledge of all the circumstances, and who paid no value for them; that defendant Hoyt has had executions issued on the judgments, and placed in the hands of the sheriff, and that Day and Hannah Thornton are wholly insolvent; and injunction is therefore prayed

to enjoin and restrain the defendants from seizing and selling plaintiff's property.

The answer denied all the allegations in the petition, and the court, after hearing the proofs of the respective parties, found for the plaintiff and decreed a perpetual injunction as prayed for.

We have thus abstracted the main points in the petition, because it contains the statements or charges on which the plaintiff relies for relief. The answer was only a denial, and so the issues were sharply presented in the allegations of the petition.

It would be useless to enter into an examination or detail of the evidence. It is sufficient to say, that after a careful perusal of it we are satisfied that the finding and action of the court was correct. The testimony of the plaintiff's witnesses was direct and positive, and well supported all material averments set forth in the bill.

It is true there were denials on the part of the evidence for the defendants, but take it altogether, it was not as satisfactory as that adduced by the plaintiff. The most that can be said is, that the evidence was contradictory, and, as it was principally oral, the court below was much more competent to arrive at a just estimate of its value than we possibly can be.

In such a case we cannot disturb the finding, though we think here, that the plaintiff's testimony was the most satisfactory. Besides the actions of the parties strongly tend to corroborate the plaintiff's allegations and proofs. They are surrounded by suspicious circumstances. The withdrawing of the first executions, when it is alleged there was sufficient property of Hannah Thornton, out of which they could be satisfied; the assignment of the judgments to Sloan upon the discontinuance of the proceedings in bankruptcy; their being held up and subsequent assignment to the defendant, Hoyt, who appears to have been the active manager in all these transactions; constitute facts not easily explainable in consonance with fair dealing towards the plaintiff.

The evidence went strongly to show, that the plaintiff was injured by relying on an agreement with the other parties; that he lost his recourse for indemnity in consequence of their acts; and their good faith in the subsequent transactions is certainly liable to question. No reason is perceived for disturbing the action of the court below.

Judgment is affirmed. All the judges concur, except Judge Vories who is absent.

ELIZABETH L. SWEANEY, *et al.*, Respondents, *vs.* GRANVILLE H. MALLORY, *et al.*, Appellants.

1. *Administration—Mortgage—Sale by administrator—Subrogation—Dower.*—A widow sued for dower in land sold by the administrator of her husband, out of the proceeds of which sale a judgment on a mortgage by husband and wife was satisfied, and the purchaser claimed that he should be subrogated to the rights of the mortgagee. *Held,* that the purchaser could not be subrogated. (Jones vs. Bragg, 33 Mo., 337.)
2. *Estoppel—Dower—Sale of land by administrator—Assent of widow.*—Where an administrator sells land, representing it to be free of incumbrances, and the widow being present assents to this statement, and states that it will be sold free of her claim of dower, she is estopped from subsequently claiming dower in the land sold.

Error to Clinton Circuit Court.

John Conover, for Plaintiff in Error.

I. If a dowress is guilty of fraudulent practices in inducing the purchaser to take the estate under a belief that she waives her dower, she will be estopped from afterward claiming dower. (2 Scrib. Dow., 257; Deshler vs. Beery, 4 Dal. [Pa.], 300; Dougrey vs. Topping, 4 Paige, 94; Lawrence vs. Brown, 1 Seld., 394; Wood vs. Seely, 32 N. Y., 105; Smiley vs. Wright, 2 Ohio, 506; Ellis vs. Didon, 1 Cart [Ind.], 561; S. C., 1 Smith [Ind.], 354; Storrey vs. Bank of Charleston, 1 Rich. Eq. [S. C.], 275; Sto. Eq. [11 ed.], §§ 385, 385*a*, 1546; 4 Kent Com. [9 ed.], t. p. 287, n. *b*.; 3 Thos.

Coke, t. p. 342; Fonbl. Eq., 163; Wendall vs. Van Ransellaer, 1 John. Ch., 353; Skinner vs. Stouse, 4 Mo., 93; Taylor vs. Zepp, 14 Mo., 482; Lindell vs. McLaughlin, 30 Mo., 28; Newman vs. Hook, 37 Mo., 207; Rice vs. Bunce, 49 Mo., 231; Chouteau vs. Goddin, 39 Mo., 229–250; Huntsucker vs. Clark, 12 Mo., 333, 339; Norton vs. Kearney, 10 Wis., 397; Darrell vs. Odell, 3 Hill., 319; Chynowith vs. Tenney, 10 Wis., 397; Racine Co. Bk. vs. Lathrop, 12 Wis., 466.)

James L. Davis, for Defendant in Error.

I. The widow's admissions were made under a misapprehension of her legal rights, and therefore do not affect her. (14 Mo., 482; 24 Mo., 254.)

II. The doctrine of subrogation is inapplicable to this case. (Jones vs. Bragg, 33 Mo., 339.)

WAGNER, Judge, delivered the opinion of the court.

This was a suit brought by plaintiff, formerly widow of George Mallory, deceased, for the assignment of dower in the real estate of which her late husband died seized and possessed.

The defendants in their answer alleged, that in his life time George Mallory mortgaged the land (in which mortgage plaintiff Elizabeth joined, relinquishing her right of dower), to secure the payment of a debt of one thousand dollars, and died leaving the debt unpaid; that the holder of the debt and mortgage obtained a judgment therein in the circuit court against George Mallory's administrator for the sum of about thirteen hundred dollars, and foreclosing the equity of redemption to the said lands. Afterwards, the administrator obtained an order from the probate court for the sale of the real estate, and in pursuance of that order he exposed the same for sale to the highest bidder; that the administrator caused the absolute title to be sold, including the dower of the plaintiff, who was present at the sale and assented to the same, and admitted that the sale was absolute and free from her claim

of dower, and that the purchaser would acquire an absolute title, free from any claim of dower on her part; that one of the defendants, Ray, relying on the assent and admissions of the plaintiff, was induced to purchase the said real estate in good faith and for full value at the price of one thousand seven hundred and eighty two dollars and fifty cents, and that he received a deed from the administrator for the same; that out of the purchase money the amount due on the mortgage and judgment was paid, and that defendant went into possession of the lands, and made valuable and lasting improvements on them, for which reasons the plaintiff should be estopped from claiming dower in the premises. The answer further claimed that defendant was entitled to be subrogated to all the rights of the mortgagee.

All the above recited and foregoing parts of the answer were stricken out as constituting no defense, and defendant excepted. The court then proceeded, and had dower assigned.

In the case of Jones vs. Bragg (33 Mo., 337), it was held that the doctrine of subrogation was not applicable to a case like this.

The only question then presented for our determination is, whether the matters alleged in the answer constituted an estoppel.

In his treatise on Dower, Mr. Scribner says: "It is a point upon which the authorities are generally agreed, that if the dowress is guilty of fraudulent practices in inducing the purchaser to take the estate under a belief that she waives her right to dower, she will be estopped from afterwards setting up her claim." (2 Scrib. Dow., 251.) Numerous cases are referred to by the author, which support the doctrine laid down in his text. In Dougrey vs. Topping (4 Paige, 94), where real estate of a decedent was sold by an administrator and administratrix under a surrogate's order, in which estate the administratrix was entitled to dower, and in the terms of sale it was stated that a clear and satisfactory title would be given, and the purchaser paid the full value of the premises

under a belief that he was obtaining a perfect title, it was held, that the silence of the administratrix as to her claim of dower was such a fraud upon the purchaser as to preclude her from afterwards setting up such claim against him, or his assigns. In determining the case the chancellor remarked as follows: "As the administratrix joined in the report of the sale to the surrogate, she must have been present at the sale, either personally, or by her agent; and must have seen the written terms of the sale, in which it was stated that the purchaser was to have a clear and satisfactory title. It was the brewery and lot on which it stood, and not merely the decedent's interest therein, for which a clear and satisfactory title was to be given to the purchaser, and that necessarily excluded the idea that the purchaser was to take the property incumbered with a right of dower, which had then become vested by the death of the husband. It therefore seems to be impossible, that any of the parties could have supposed the purchaser was to take the property at its full value, and yet that the claim of dower was not to be relinquished. As the defendant must have known that Vassar was paying his money under a supposition that he was getting a perfect title, if Mrs Topping did not intend to part with her dower, conscience required her to speak, and silence under such circumstances was such a fraud upon the purchaser as to prevent her from afterwards making her claim for dower in the premises."

In Smiley vs. Wright (2 Ohio, 506) the widow was present at a sale of her husband's lands by his administrator and consented that the sale might be made free from her claim of dower. The purchaser, relying upon this promise, bid off the property at a much larger sum than he would otherwise have paid. A bill for dower afterwards brought by the widow was dismissed. The court in disposing of the case, said: "It is a well established principle in equity, that if a person, having a right to an estate, permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right; and the rule prevails even against

feme coverts and persons under age. It is contended on the part of the complainants, that the acts and declarations of Mrs. Smiley, at the time of the sale of the lots in question, ought not to bar her of the aid of a court of equity, because she was at that time ignorant of her rights, nor can they be considered as a fraud upon the purchaser, as he had notice of her title. It is unnecessary to consider whether a person having legal title to lands, who encourages the sale by another, shall be permitted to show his ignorance of that title, to the prejudice of a *bona fide* purchaser for a valuable consideration, as we are already of the opinion that the evidence does not prove Mr. Smiley's ignorance of her rights at the time of the sale by the administrator. * * * If she had not in fact relinquished her right of dower, her standing by, permitting the property to be sold free of dower without asserting her claim, was calculated to deceive and defraud the purchaser, and did induce him to pay a much larger sum for the property than he would otherwise have given. He believed that she had relinquished her dower, and acted upon this belief. To permit her to assert her title to dower against a *bona fide* purchaser for a valuable consideration, who was induced by her to purchase, because she has never executed any formal act of assignment or release of her dower, would be to aid her in the commission of fraud."

So in Ellis vs. Didon (1 Cart. [Ind.], 561), which was a proceeding for dower, and the defendant pleaded in bar, that the guardian of the heirs of the deceased husband obtained an order for the sale of the lands in which dower was claimed; that the widow was present in court and concurred in the application for the order; and that the premises were sold to the defendant, the widow receiving a portion of the purchase money in payment of her right of dower. He further averred, that the widow was present at the sale, and heard the commissioner represent that the purchaser would receive a title free from all claims, and concurred therein, and gave no notice of any claim upon the estate. It was held, if the matters so alleged were true, the petitioner was estopped from asserting a right of dower.

Many more cases might be cited to the same effect, but it is unnecessary.

Now the allegations in the answer are, that the administrator put up the real estate for sale representing that it was free from incumbrance, and that he would make a perfect title; that the plaintiff was present and assented to it, and stated that it would be sold free from her claim of dower, and that, relying upon the representation of the administrator, and the assent and declarations of the plaintiff, defendant purchased and paid full value for the premises. If these averments are true, they will undoubtedly estop the plaintiff from prosecuting her claim. She was at the time a *feme sole*, laboring under no disabilities, and to permit her to recover in the face of these facts would be enabling her to perpetrate a fraud upon the purchaser.

The court erred in striking out the answer and the judgment will be reversed and the cause remanded. All the other judges concur, except Judge Vories, who is absent.

———o———

ARTHUR M. BROWN, Respondent, *vs.* THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY, Appellant.

1. Kenney vs. Hann. & St. Joe R. R. *ante* p. 476 affirmed.

Appeal from Grundy Circuit Court.

James Carr, for Appellant.

Shanklin, Low & McDougal, for Respondent.

NAPTON, Judge, delivered the opinion of the court.

This case involves the same question decided at this term in the case of Kenney vs. the same defendant.

The judgement is affirmed. The other judges concur. Judges Wagner and Vories absent.

GEORGE H. MANN, *et al.*, Appellants, *vs.* WILLIAM BEST, *et al.*, Respondents.

1. *School funds, loan of—County courts—Mortgages—Statute, construction of.*—Section 22 of the act of 1855 (R. C. 1855, p. 1424) is merely directory, but where a mortgage is taken under that act for the loan of school funds, the statute must be in all respects complied with; still a mortgage taken by the county for the loan of such funds, not under the statute, but good at common law, and containing a power of sale by the mortgagee or his agent, is valid.
2. *Evidence—Res gestæ—Private entry—Certificate made at the time—Party dead.*—Notices of a sale under a mortgage were delivered by the mortgagee to a sheriff to post up, and the sheriff certified on the back of the advertisement the facts as to his posting up the notices and dated his certificate. At the time of the trial, the sheriff was dead, but a witness testified that the sheriff wrote and signed the return in his presence and on the day it bore date. *Held*, that the certificate was a private entry, but was admissible in evidence as part of the *res gestæ*.
3. *Mortgages—Sales under—Collusion between trustee and purchaser.*—A., as agent for the mortgagee, sold the land mortgaged to B., having previously agreed with B. to furnish half the purchase money and divide the profits. *Held*, that the sale was a fraud on the mortgagor and mortgagee.
4. *Sheriff's sales—Purchaser—What title acquired—Recording acts.*—A purchaser on execution buys only the title of the judgment debtor, and if that title was subject to equities, it remains so in the hands of the buyer, although they may be totally unknown to him. This general proposition is much modified by the recording acts of this State. (Hill vs. Paul, 8 Mo., 480; Davis vs. Ownsby, 14 Mo., 175; Valentine vs. Havener, 26 Mo., 133.)
5. *Conveyances—Quit-claim—What title acquired.*—A purchaser by quit-claim obtains just such title as the vendor had, and the land in his hands remains subject to the equities attaching to it in the hands of the vendor, though they may be unknown to the purchaser.

Appeal from Gentry Circuit Court.

Bennett Pike, with G. W. Lewis, for Appellants.

I. The county court had no right to take such a mortgage for school moneys. It had no power to do any act in relation to the loaning of the school fund, except such as the laws of the State specifically gave it. (Ray Co. vs. Bentley, 49 Mo., 236; R. C., 1855, p. 1424, § 22; Id., p. 1425–6, § 30; Norcum vs. D'Oench, 17 Mo., 117.)

II. The mortgagor in the mortgage could confer no power upon said county court to appoint an agent to sell said mort-

gaged lands, or to convey the same, nor could the county court make good the act of the agent by ratification. (Hodges vs. City of Buffalo, 3 Den., 110; English vs. Smock, 34 Ind., 115; 7 Am. R., 215; Frees vs. Ford, 6 N. Y., 176.)

III. The sheriff's return, that he had posted the notices, is not evidence. His certificate of the fact is a mere statement of a private individual.

IV. The agent, selling the land, and the purchaser, were jointly interested in the purchase. This renders the sale void so far as the purchaser is concerned, and his vendee who is not an innocent purchaser. (Wooton vs. Hinkle, 20 Mo., 290; Hook vs. Turner, 22 Mo., 333; Durfee vs. Moran, 57 Mo., 379; Thornton vs. Irwin, 43 Mo., 153.)

V. Defendant was not an innocent purchaser as he took by quit claim deed. (Ridgeway vs. Holliday, 59 Mo., 444.)

Isaac P. Caldwell, with J. C. Howell, for Respondents.

I. Foreclosure may be accomplished in accordance with the terms of a power of sale. (Beatie vs. Butler, 21 Mo., 321; 1 Hill. Mort., 3d ed., 130, 140; 2 Id., 51, 74, 78, 79, 82–3; Bergen vs. Demarest, 4 John. Ch., 37; Elliott vs. Wood, 53 Bart. [N. Y.], 285: Tuthill vs. Tracy, 31 N. Y., 157; Cormerais vs. Genella, 22 Cal., 116; Johnstone vs. Scott, 11 Mich., 232; Donnelly vs. Simonton, 7 Minn., 167; Leffler vs. Armstrong. 4 Iowa, 482.)

II. The statute (R. C. 1855, p. 1424, § 22) is directory. (Marion Co. vs Moffatt, 15 Mo., 604; Pot. Dwar. Stat., 221–6 and notes.) The mortgage is distinguished from those mentioned in Jones vs. Mack (53 Mo., 147), and Honaker vs. Shough (55 Mo., 472). They were drawn according to the statute. In the first, the sheriff sold without an order. In Honaker vs. Shough, the order of sale misdescribed the land, and did not correctly recite the debt, so as to identify the mortgage. This is simply a mortgage with power of sale, and is good at common law.

III. The property being in the hands of an innocent purchaser for value, redemption will not be allowed unless the

sale is absolutely void. If plaintiff had any remedy, it was against other parties. (Rutherford vs. Williams, 42 Mo., 34; Goode vs. Comfort, 39 Mo., 328.)

IV. The copy of the notice and the return, showing the posting of the notices, were properly admitted in evidence. (1 Greenl. Ev., §§ 115, 116.)

V. The petition contains no equity. There is no offer to pay the whole amount of the mortgage debt, but only a fractional part of what is due. (Mullanphy vs. Simpson, 4 Mo., 319; Polk vs. Clinton, 12 Bes., 59; 2 Black. Com. [Sharswood's notes], 159, note 8; Crafts vs. Crafts, 13 Gray, 363; Hill Mort., 1st vol., 402–3, and notes.)

NAPTON, Judge, delivered the opinion of the court.

The plaintiffs in this case, who are four of the five heirs of Jeremiah Wright, by their petition, filed in 1872, ask to redeem a mortgage given to Gentry county by said Wright to secure the sum of $1,010, borrowed of the school fund. The mortgage was given in 1859, and the deed stated that the party of the second part (Gentry county) "is hereby authorized and empowered by the said party of the first part, by her agent to be appointed by the county court for that purpose, to sell said described premises, or any part thereof, first giving twenty days' notice, etc."

Wright, the mortgagor, died in 1862, and in April of that year, after Wright's death, the county court of Gentry county appointed C. G. Comstock, who was then county attorney, as a commissioner to "foreclose the mortgage." Comstock advertised the land for sale by a notice, which he handed to the sheriff, and the sheriff's return upon the advertisement was in writing, and was, that he had posted up copies of it in six public places in Gentry county, at least twenty days before the day fixed for the sale in said notice. The sheriff was dead at the trial, and the certificate was given in evidence as proof of the publication being in conformity to the terms of the mortgage. One Cunningham became the purchaser at the price of $400, which was about $1.40 per acre for the entire

tract of 280 acres. The farm was worth from two to three thousand dollars.

Before the sale, an arrangement was made between Cunningham and Comstock, that Comstock would furnish half the money for the purchase, and he and Cunningham would jointly reap any profits which might arise from the sale. The sale was duly reported to the county court, who approved of it, and Comstock made a deed to Cunningham, to the form of which no objections are made.

In 1864 Cunningham sold this land, or at least conveyed his interest in this land by a quit-claim deed to the defendant, Best, who had shortly before migrated from Kentucky, and who, it appears from the testimony, had no information in regard to the interest of Comstock in this land, or to the arrangement between Comstock and Cunningham. Best took a quit-claim deed and paid $2,000 for it, and in his defense sets up that he was a *bona fide* purchaser for a valuable consideration without notice. After Best went into possession, he paid $100 to the oldest son of Wright for his interest, and took a relinquishment from him of his interest, and also executed a paper to the administrator, promising to pay $100 to each of the other heirs, on their arriving at age, for their interest in the land.

The plaintiffs ask that they be allowed to redeem four-fifths of the mortgage, and that Best be required to redeem the other one-fifth. The circuit court, after hearing all the evidence, decided for the defendant, and from this judgment an appeal is taken to this court.

For the plaintiffs it is insisted in this court, that the mortgage taken by the county court was void, since it did not conform to the requisitions of the statute concerning the loan of school funds; that the county court had no power to appoint an agent or commissioner to sell the mortgaged lands, or to ratify such a sale after it was made by the agent; and the decision of this court in Ray Co. vs. Bentley (49 Mo., 236), is mainly relied on to show that this court can only control the school fund in the manner specifically pointed out by law.

In that case the county bought in the mortgaged land through the agency of the county court, and this was held beyond the power of the court, and against the general policy of the act regulating the disposition of this fund. But we consider the 22d section of the act of 1855 (R. C. 1855, p. 1424) as merely directory. It specifies the kind of mortgage which the court is required to take, and is so particular as to give in substance all the provisions it should contain. Where the mortgage is taken under these provisions, the statute must be in all respects complied with; but we do not see that the interest of the school fund would be advanced by holding that any other mortgage, which would be good at common law, should be held void. The mortgage in this case did not follow the prescribed form, but was a mortgage with a power of sale, conferred by the mortgagee in the instrument, to be executed in a mode pointed out in the mortgage. The neglect of the county court to follow the directions of the statute ought not to destroy a security otherwise good and effectual to accomplish the same purposes.

The power of the county court to appoint an agent to sell the land, upon the failure of the mortgagor to pay the debt, is conferred on the court expressly by the mortgagor himself. This power is not derived from the statute, and the proceeding under it cannot be governed by the statute. A mortgage with a power of sale in the mortgagee, or by his agent, has been repeatedly recognized as valid by this court, and no reason suggests itself why it should not be so where a county is the mortgagee. The order of the county court, directing the agent to "foreclose," was substantially an order to sell, as that was the mode of foreclosure authorized by the mortgagor.

In regard to the proof of the publication of the advertisements, there is some ground for doubt; but I think the proof was admissible. Had the sheriff been required by law to put up such notices, there could be no question of the admissibility of his certificate; but, as we have not been referred to any statute, which made it his duty in proceedings of this kind,

the evidence must stand on the ground of a private entry. The proof was, however, that the notice, on which this return was made, was placed in the hands of the sheriff by the commissioner to be posted up; that the sheriff wrote the return and signed it in his presence, and that it was written on the day it bears date, and the sheriff was dead before the trial. I cannot see very well how under the circumstances any stronger proof could be offered. The sheriff was a public officer, having no motive to make a false entry on the paper handed to him, and the entry was made at the time the transaction was still in progress. It was a part of the *res gestae*. (Greenl. Ev., § 115; Doe vs. Sanford, 3 B. & Ad., 890; Poole vs. Decus, 1 Burgh [N. C.], 654.)

The important point, however, on which the merits of the case depend, is whether the defendant Best is a purchaser for value without notice; for if he is, whatever may have been the infirmity of the title conveyed to Cunningham, the defendant, Best, could not be reached. That the plaintiffs had a right to redeem this mortgage so long as the title remained in Cunningham, is well established. The collusion between Comstock and Cunningham rendered the sale a fraud both upon the mortgagee and mortgagor. (Thornton vs. Irwin, 43 Mo., 153.)

The evidence in this case shows very clearly, that Best was a purchaser for value and without notice of any infirmities in Cunningham's title. He was a stranger in the country and was, so far as the record shows (Best, Cunningham and Comstock being all witnesses in the case), totally ignorant of the collusion between Comstock and Cunningham; and he gave a full, or, at least, fair price for the land.

But the question is, what did he buy? It is well settled as a general proposition, that a purchaser under execution is not a purchaser that comes within the protection of this well established equitable rule, because he buys only such interest as the judgment debtor has; and, if the interest is subject to equities, although totally unknown to the buyer, the title is still subject to the same equities. (Hart, Leslie & Co. vs. F. & M. Bank, 33 Vt., 252; Whitford vs. Guager, 3 Hare, 416.)

This proposition, however, is very much modified by our recording acts (See Hill vs. Paul, 8 Mo., 479; Davis vs. Ownsby, 14 Mo., 175; Valentine vs. Havener, 20 Mo., 134); but as no question arises on it here, it is useless to consider the modifications effected by our recording act. (See, also, Black vs. Long, 60 Mo., 182.) And such seems to be the settled law in regard to a buyer, who takes a quit-claim deed. In Oliver vs. Pyatt (3 How., 333) Mr. Justice Story observes, "another significant circumstance is, that this very agreement contained a stipulation that Oliver should give a quit claim deed only for the tracts; and the subsequent deeds, given by Oliver to him accordingly, were drawn up without any covenants of warranty, except against persons claiming under Oliver or his heirs and assigns. In legal effect, therefore, they did convey no more than Oliver's right, title and interest in the property; and under such circumstances, it is difficult to conceive how he can claim protection as a *bona fide* purchaser, for a valuable consideration, without notice, against any title paramount to that of Oliver, which attached itself as an unextinguished trust."

And in Brown vs. Jackson (3 Wheat., 449) a conveyance of the right title and interest in a tract of land was held only to convey the estate, which the grantor at the date of the deed possessed, and would not convey an after acquired title. The same doctrine was asserted by this court in Bogy vs. Shoab (13 Mo., 330).

And in May vs. Lectrine (11 Wall., 232) Mr. Justice Swaine says: "On the 27th of July, 1859, Desaint conveyed by a deed of quit-claim to Ebenezer Cook. The evidence satisfies us that Cook had full notice of the frauds of Powers, and of the infirmities of Desaint's title. Whether this was so or not, having acquired his title by a quit-claim deed, he cannot be regarded as a *bona fide* purchaser without notice. In such cases the conveyance passes the title as the grantor held it, and the grantee takes only what the grantor could lawfully convey. Cook occupied the same relation to the property as Desaint, his grantor."

And so, in conformity to these views, is the recent decision of this court in Ridgeway vs. Holliday (59 Mo., 444).

In the case now under consideration it seems probable, from all the evidence, that the defendant, Best, was guilty of no bad faith in making the purchase he did; but as he bought only the title of Cunningham, and that title, though on its face valid and complete, was subject to be set aside by reason of the fraudulent arrangement between Comstock and Cunningham, he must abide by the risks of such infirmities as the nature of his acquired title subjected him to.

The plaintiffs were entitled to redeem four-fifths of the land; with the remaining interest of one-fifth vested in the defendant, Best, by purchase from one of the heirs of Wright, the plaintiffs have no concern.

The judgment is reversed and the case remanded. The other judges concur.

EDWARD F. PERKINS Respondent, *vs.* WILLIAM QUIGLEY, Appellant.

1. *Sheriff's deed—Recitals—Transcript from justice—Execution and return nulla bona.*—In a sheriff's deed on an execution issued on a transcript from a justice, it is not necessary to recite that an execution was issued by the justice and returned *nulla bona.* (Carpenter vs. King, 42 Mo., 224.)
2. *Officers, public—Clerk of circuit court—Acts, presumption in favor of validity of—Execution issued on transcript.*—The clerk of the circuit court being prohibited from issuing an execution on a transcript from a justice, till an execution has been issued by the justice and returned *nulla bona, semble,* that it will be presumed when the clerk issues an execution, that such prior execution has been issued and returned *nulla bona.*
3. *Homesteads—What constitutes—Contiguity of land—Statute, construction of.* The only restrictions concerning homesteads in the statute (Wagn. Stat., 697, § 1), relate to the quantity and value of the land, and the parcels of land composing it need not be contiguous, provided they are used in connection with each other.

Appeal from Linn Circuit Court.

Brownlee, for Appellant.

I. The sheriff's deed is void on its face, inasmuch as it does not recite that executions had been issued on the judgments recited in the deed by the justice, and that they had been returned *nulla bona* before the executions were issued by the clerk of the circuit court. (Wagn. Stat., 839, § 14; Id., 612, § 54; Coonce vs. Munday, 3 Mo., 264; Waddell vs. Williams, 50 Mo., 224.) If the execution must contain this recital, then the deed must, or some evidence must be produced to, show that the execution was properly issued. (Carr vs. Youse, 39 Mo., 349, and authorities above cited.)

II. The head of a family can claim, and hold, two small tracts of land which adjoin each other, as his homestead, using and occupying them both as such, they not containing a greater number of acres than one hundred and sixty, nor exceeding in value the sum of fifteen hundred dollars. (Wagn. Stat., 697, § 1.)

A. W. Mullins, for Respondent.

I. The sheriff's deed contained all the recitals required by the statute. (Wagn. Stat., 612, § 54.) No further evidence was necessary in order to its admission. (Id., 612, § 57; McCormick vs. Fitzmorris, 39 Mo., 24; Merchant's Bank vs. Harrison, 39 Mo., 443; Carpenter vs. King, 42 Mo., 219.)

The case of Coonce vs. Munday (3 Mo., 373) has been modified and substantially overruled by subsequent decisions of this court. (Norton vs. Quimby, 45 Mo., 388.)

II. The defendant occupied and claimed another farm as his homestead, and this farm was subject to levy. (Wagn. Stat., 699, § 8.)

Napton, Judge, delivered the opinion of the court.

This was an action of ejectment, and the title of the plaintiff was derived from a sale and execution levied on land claimed to be protected from execution under the homestead law.

The execution was dated April 3, 1873, and was levied on the 4th of April, 1873, and the sale took place in June, 1873. The notes, upon which the judgment was based, were given in September, 1871.

The defendant in the execution bought a tract of sixty acres of one Henderson in February, 1871, and his deed was recorded in April, 1871. The defendant moved on to the place with his family, and in the month of May, 1871, he bought another tract, adjoining the former, of about seventy-nine or eighty acres from one Wells, and in the fall of that year moved over to this last place, called the Wells place, with his family; and his son (who seems to have been a man of family) moved into the house first occupied by the defendant in the spring and summer of this year. The father and son cultivated the two places conjointly. At the date of the levy and sale above stated, the defendant and his wife were living on the Wells place. The value of either tract, or both, is not shown by any evidence in the case, except that the deeds recite the payment of $1,000 for the Henderson place, and $1,500 for the Wells place.

The court gave the instructions asked by the plaintiff, and also the one asked by defendant, and found a verdict (there being no jury) for the plaintiff, and judgment was entered accordingly.

The instruction given for the plaintiff was as follows:

"If the court sitting as a jury believe from the evidence, that the indebtedness from the defendant to the plaintiff, upon which the judgments were obtained, as recited in the sheriff's deed read in evidence by plaintiff, accrued in the month of September, 1871, or about that time, and that afterwards defendant purchased the premises described in the deed read in evidence from E. P. Wells and wife, which deed is dated May 12, 1872, and that defendant moved to said last named premises and was occupying the same with his family as his homestead at the time plaintiff filed the transcript recited in the sheriff's deed in the office of the clerk of this court, and also at the time the premises in ques-

tion were sold by the sheriff, and purchased by plaintiff, then the plaintiff is entitled to recover."

2. "The defendant is not entitled to hold two homesteads, exempt from levy and sale under execution, at the same time; and if the court, sitting as a jury, believe from the evidence, that the defendant moved with his family from the Henderson place, the premises now in controversy, to the Wells place, and was occupying the same as his homestead, and claiming as such at the time the sheriff levied upon and sold the Henderson place, then the finding should be for the plaintiff."

The instruction given for the defendant was as follows:

"If the court believe from the evidence, that the defendant had acquired the tract of land here sued for, and had filed his deed to the same for record, before contracting the debts upon which the judgments were rendered and execution issued recited in the sheriff's deed read in evidence by plaintiff, and had ever since the said purchase used or occupied the same as his homestead, never having intentionally abandoned the same as such, having all that time a family of his own with whom he resided, it is bound to find for defendant, provided it is further found, that said tract of land does not exceed in value, and did not at the time of the sheriff's sale, the sum of $1,500, and does not contain a greater number of acres than one hundred and sixty."

There was a point made on the trial in regard to the admissions of the sheriff's deed offered by the plaintiff, that it did not recite that executions had been issued by the justice of the peace, before whom the judgments were rendered, and returned *nulla bona* before the execution was issued from the clerk's office of the circuit court. This objection was overruled, and, we think, properly.

The statute concerning executions (Wagn. Stat., 612, § 54) provides, that the sheriff's deed shall recite the names of the parties to the execution, the date when issued, the date of the judgment, order or decree, and other particulars as recited in the execution, also a description of the property, the

time, place and manner of sale, which recital shall be received as evidence of the facts therein stated. In the 7th article of the act concerning justices' courts (Wagn. Stat., 839) the 14th section provides, that "No executions shall be sued out of the court where a transcript is filed, if the defendant is a resident of the county, until an execution shall have been issued by the justice, directed to a constable of the township in which the defendant resides, and returned that the defendant had no goods or chattels whereof to levy the same."

In the case of Carpenter vs. King (42 Mo., 224) the sheriff's deed admitted in that case contained no recital of the issue of an execution from the justice's court, or of any return therein, and was held sufficient *prima facie* evidence of the validity of the execution issued from the clerk's office, and the recitals were declared to contain every material fact required by the statute. The court observed, that "the fact that the execution was issued on a transcript cannot distinguish it, in the operation of the rule, from a case where it was issued on a judgment of the court."

It may be observed in addition to what was said in the case of Carpenter vs. King, that the prohibition of the act does not extend to all cases, for if the defendant was a non-resident of the county, the clerk might issue his writ of execution without regard to the issuance of any by the justice. And, moreover, if it is necessary that this fact be recited in the deed, it would seem equally necessary that the execution of the justice should be directed to the township in which the defendant resides.

Upon general principles, it would seem, that, as the clerk had no power to issue an execution, until after one was issued by the justice and returned *nulla bona*, but was expressly prohibited from so doing, the issuance of such execution from the clerk's office raised the presumption, usually indulged in regard to public officers, that he did his duty and obeyed the statute, until the contrary appeared.

The instructions in this case are, in our opinion, based on an erroneous construction of the statute concerning home-

steads. The statute defines the word homestead as "a dwelling house and appurtenances, and the land used in connection therewith." In Webster's Dictionary it is defined as "a person's dwelling place, with that part of his landed property which is about and contiguous to it." But contiguity does not seem to enter into our statutory definition. A housekeeper or head of a family may, under our law, own 40 acres in one place, and cultivate 40 more in another by himself, his children or servants or tenants. It frequently happens that a prairie farm is dependent upon a piece of woodland several miles distant, and both may constitute the homestead; or the owner of a piece of ground on a bluff, where there is a convenient spring and timber, may cultivate a farm in the valley totally separated from the place of residence by any conceivable distance, that would not render the one incapable of being used in connection with the other. The only restrictions named in the act are the quantity of land and its value. The whole cannot exceed 160 acres and must not be worth more than 1500 dollars.

In the case now under consideration the two tracts of land, called the Henderson place and the Wells place, were contiguous. There were dwelling houses on each. The defendant, after purchasing the one, shifted his residence to the other, and subsequently placed his son on the one left, still, however, using both places for the support of his family, of which his son constituted a member. There is nothing in the act, which prohibits the householder from moving from one part of his farm to another, or from working or using any portion of it by his children or servants or tenants.

The probability is, that here the value of the two tracts exceeded the amount allowed the protection of the statute. In such case, it was the duty of the sheriff to ascertain by appraisers the value of the whole tract, or the two tracts, and thus ascertain the location and boundaries of the homestead, and then proceed with his levy on the residue subject to execution, and make return on the execution accordingly.

The judgment is reversed and the cause remanded. The other judges concur, except Judge Vories, absent.

SAMUEL MATTHIS, Plaintiff in Error, *vs.* INHABITANTS OF THE TOWN OF CAMERON, *et al.*, Defendants in Error.

1. *Injunction—Illegal taxation—Who can injoin.*—To prevent illegal action on the part of municipalities, tending to increased taxation, the State, through the Attorney General or Circuit Attorney, or any tax payer of the municipality, may institute a proceeding for an injunction.
2. *Commercial paper—Town warrants.*—Warrants of towns in this State are not commercial paper.
3. *Agent—Judgment obtained by neglect—Liability of principal.*—Mere neglect of an agent or attorney to defend a suit will not discharge the principal from the judgment obtained, unless there was a fraudulent combination or collusion, participated in by the plaintiff.

Error to Clinton Circuit Court.

J. F. Harwood, for Plaintiff in Error.

I. Town warrants are not negotiable. (Clark vs. City of Des Moines, 19 Iowa, 199.)

II. A tax payer may maintain a bill in equity for relief against a fraudulent judgment. (Dill. Mun. Corp., 1st ed., §§ 734, 736.)

III. The failure of the officers of the town to answer and defend, when the corporation was sued, was a fraud on the tax payers.

S. H. Corn, for Defendants in Error.

I. The petition charged no fraud upon the defendant Cox, and no collusion on his part in obtaining the judgment.

NAPTON, Judge, delivered the opinion of the court.

This was an application at the April Term, 1875, of the circuit court of Clinton county, for an injunction against the corporation called "The Inhabitants of the Town of Cameron," the trustees by name, the treasurer, and one John D. Cox. The plaintiff is a resident citizen and tax payer of said town; and the grounds, upon which he prays an injunction, as stated in the petition, are substantially as follows:

On the 3d day of July, 1871, the board of trustees, of whom B. C. Stokes was chairman, issued a warrant or order as follows:

"No. 12. The treasurer of the town of Cameron will on the 1st day of January, 1872, pay to the order of Isaac Merchant the sum of two hundred and fifty dollars, out of any money in the treasury not otherwise appropriated. Given at the clerk's office, this 3d day of July, 1871. B. C. Stokes, chairman. Countersigned, J. E. Goldsworthy, clerk." On the back of this warrant were indorsed the names "W. V. McCandless, Isaac Merchant."

Without any authority by law, the board gave this warrant to the payee therein, to aid said payee and others in surveying and locating a certain railroad, which was never built.

This warrant afterwards came into the possession of the defendant, Cox, who, on the 6th of April, 1872, commenced suit on the same against "The Inhabitants of the Town of Cameron." The process was served on Stokes, the then chairman of the board. The said Stokes (the petition alleges), "for the purpose of allowing the plaintiff to obtain a judgment, and in disregard of his official duties as trustee, etc., failed, neglected and refused to inform the board of trustees, that any such suit had been instituted, but allowed such suit to proceed to judgment without any defense."

Judgment by default was rendered, and the final judgment is as follows: "Come now the parties in the above entitled cause, etc., and the plaintiff says he will no further prosecute this suit against the administrator of W. V. McCandless, but voluntarily dismisses the same, and this cause coming on to be heard, etc., the court, after hearing the evidence, etc., finds that the said defendants, The Inhabitants of the Town of Cameron, and Isaac Merchant, are indebted to the plaintiff in the sum of $263.79. It is therefore considered, etc."

The board of trustees, on the 16th of November, 1874, caused to be issued to Silas H. Corn, attorney of said defendant Cox, a certain warrant or order on the treasury of said town of Cameron, for the amount of this judgment, which warrant is still held by said Corn, and said Cox, through his

attorney, is still endeavoring to collect said warrant from the treasurer, and has succeeded in getting $12.47 of the amount, and, unless restrained, he will get the remainder.

The last warrant referred to is this: "No. 87. The treasurer of the town of Cameron will pay to the order of S. H. Corn, attorney of J. D. Cox, the sum of $313.06 out of any money in the treasury not otherwise appropriated. Given at the clerk's office, 16th of November, 1874;" and on the back of this is indorsed, "Paid on the within, February 15th, 1875, $12.47. H. S. Burr, Treas."

Both these warrants are alleged to be illegal, and, if paid, will irreparably injure the financial condition of said corporation, and will defraud the plaintiff and other tax payers.

The above contains the facts alleged in the petition, and the prayer is, that an order be made restraining the defendants, and each of them, from further proceeding to consummate their illegal acts; that said judgment be set aside, and that the collection of the last warrant be prohibited, etc.

To this petition there was a demurrer, and the grounds of demurrer alleged are, 1st. That no cause of action was stated; 2d, that there was an adequate remedy at law; 3d, that the petition sets out a judgment valid and binding, and no sufficient causes are alleged to justify the interposition of equity in setting the judgment aside, and 4th, that the petition shows no sufficient diligence in asserting the alleged rights of the petitioner.

The demurrer was sustained, and the cause is brought to this court by writ of error.

It may now be regarded as settled in this State, however conflicting the decisions here and elsewhere have been, that, to prevent illegal action on the part of municipalities, tending to an increased taxation on their constituents, the State, through its appropriate officer, the Attorney General or circuit attorney, or any tax payer of the municipality, may institute a proceeding for an injunction. This I take to be the result of the two cases of the State vs. Saline Co. Court (51 Mo., 350), and Newmeyer vs. M. & M. R. R. Co. (52 Mo. 81.)

In considering the propriety of an injunction in this case, which is rather peculiar, it must be assumed, that the first warrant issued in 1871 was unauthorized. It was issued, as stated in the petition, to pay for a survey of a railroad, and we have been referred to no provision in the general statutes concerning the incorporation of towns, which authorizes such an appropriation.

It is not pretended, that an assignee of the warrant occupied any better position than the original payee, as these warrants are clearly, under our statute, not regarded as commercial paper or county bonds; but in this case, the assignee brought suit upon the warrant in 1872. and obtained a judgment. It is not averred that this judgment was obtained by fraud or collusion between the plaintiff and defendant. Had it been so averred, the result would be different. It is averred, that through the negligence of the chairman of the board of trustees, and for the purpose of allowing the plaintiff to get a judgment, no defense was made. Mere negligence, though on the part of a trustee, from whatever motive it may spring, could hardly be claimed of itself to vitiate a judgment and render it totally void. The neglect of an agent or attorney would not discharge the responsibility of the principal from a judgment obtained through such neglect, unless there was a fraudulent combination or collusion, in which the plaintiff in the action participated.

The judgment in favor of Cox being apparently valid, and no appeal taken from it, and the corporation being bound by the judgment, the second warrant issued in 1872 was fully authorized. The prayer of the petition is, that the payment of this second warrant be injoined; but the facts stated in the petition do not warrant the interposition of a court of equity. The judgment in 1872, being rendered confessedly on due notice, was binding on the corporation, until reversed or annulled or set aside by some proceeding on the part of the defendant.

The judgment on the demurrer must therefore be affirmed. The other judges concur, except Judge Vories, who is absent.

DAVID T. STANLEY, Respondent, *vs.* THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD CO., Appellant.

1. *Corporations—Citizenship—U. S. Courts, removal of causes to.*—Corporations have citizenship for the purposes of suing and being sued, and are embraced in the U. S. legislation with reference to the removal of causes to its courts from State Courts.
2. *Practice civil—U. S. Courts, removal of causes—State courts, jurisdiction of, after application for removal—Amendments to pleadings.*—After an application for the removal of a cause to the U. S. court is regularly made, the State court has no further jurisdiction, and cannot allow amendments to the pleadings.
3. *Practice, civil—U. S. Courts, removal to—Application for*—An application for the removal of a cause, which complies with the requirements of the existing law, is not invalid because it prays for the removal under laws which have been repealed.
4. *Practice, civil—Jurisdiction—Removal, application for—Trial—Other remedy—Cause, reversal of.*—By participating in the trial of a cause after the court has improperly refused an application for its removal to the United States Court, the defendant does not waive the question of jurisdiction, nor does the fact, that he might have pursued another remedy, prejudice his right to have the judgment of the lower court reversed by this court.

Appeal from Mercer Circuit Court.

Shanklin, Low & McDougal, for Appellant.

I. The plaintiff could not defeat defendant's right to have the cause removed into the circuit court of the United States by amending his petition so as to reduce the claim below the jurisdiction of a circuit court of the United States. (Kanouse vs. Martin, 15 How. [U. S.], 198; Ladd vs. Tudor, 3 Woodb. & Minot, 325: Roberts vs. Nelson, 8 Blackf., 74; Hereford vs. Ætna Ins. Co., 42 Mo., 148.)

II. The defendant did not waive his right to have the cause removed by appearing and going to trial. (Gordon vs. Longest, 16 Pet., 97; Hereford vs. Ætna Ins. Co., 42 Mo., 148.) Under the laws existing prior to the act of 1875, appeal to State Supreme Court was the only remedy when the State court refused to grant petition for removal. (Hough vs. Western Trans. Co., 1 Biss., 425.)

C. M. Wright, for Respondent.

I. The amount claimed in the petition is presumptively the amount in dispute, but the presumption is not conclusive, and plaintiff may prevent a removal by amending his petition so as to reduce the claim. (People vs. New York, C. P., 2 Den., 197; Disbrow vs. Driggs, 8 Ab. Pr., 305 note.)

Hough, Judge, delivered the opinion of the court.

The plaintiff brought suit against the defendant in the circuit court of Mercer county, claiming damages in the sum of $1,020. The defendant appeared to the action, and on the 5th day of November, 1874, and before filing an answer, presented to the court a petition, affidavit and bond, praying for a removal of the cause into the circuit court of the United States for the western district of Missouri, under the act of congress of July 27, 1866, as amended by the act of March 2, 1867, and alleging that the plaintiff was a citizen of the State of Missouri, and that the defendant was a corporation organized and existing under the laws of the States of Illinois and Iowa, having its principal place of business in Chicago, in the State of Illinois, and was a citizen thereof; that the amount in controversy exceeded the sum of five hundred dollars, and that the affiant had reason to believe, and did believe, that from prejudice and local influence of the plaintiff the defendant would not be able to secure justice in said Mercer circuit court.

The plaintiff thereupon asked and obtained leave of the court to amend his petition, and on the succeeding day filed an amended petition, claiming only four hundred and eighty dollars damages.

The defendant's application for change of forum was then refused, and the cause proceeded to trial in the circuit court, where judgment was rendered for the plaintiff, and the defendant has brought the case here by appeal.

No objection was made to the form of the application, or the facts on which it was founded, nor was the sufficiency of the bond questioned.

While the application was made in November, 1874, the removal was asked under the provisions of the act of July 27, 1866, as amended by the act of March 2, 1867—statutes which had been repealed by the adoption of the Revised Statutes of the United States on the 22d day of June, 1874. The substantial provisions of these acts, however, were incorporated in section 639 of the Revised Statutes, and are as follows:

"Any suit commenced in any State court, wherein the amount in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, to be made to appear to the satisfaction of said court, may be removed, for trial, into the circuit court for the district where such suit is pending, next to be held after the filing of the petition for such removal, hereinafter mentioned, in the cases and in the manner stated in this section."

First * * * * * * *

Second * * * * * *

Third. "When a suit is between a citizen of the State in which it is brought, and a citizen of another State, it may be so removed on the petition of the latter, whether he be plaintiff or defendant, filed at any time before the trial or final hearing of the suit, if, before or at the time of filing said petition, he makes and files in said State court an affidavit stating that he has reason to believe, and does believe, that from prejudice or local influence he will not be able to obtain justice in such State Court."

The section further provides for giving a bond conditioned as therein provided, and proceeds as follows:

"It shall thereupon be the duty of the State court to accept the surety, and to proceed no further in the case against the petitioner." * * *

Inasmuch as the application conformed in every essential particular to the law in force at the time it was made, we do not conceive that the mistake made in invoking, as authority for the removal, statutes which no longer existed as separate enactments, would impair the efficacy of the application.

Corporations have citizenship for the purpose of suing and being sued, and the legislation of congress on the subject under consideration embraces them as well as individuals or natural persons. (Hereford vs. Ætna Ins. Co., 42 Mo., 148.)

The circuit court erred in permitting the plaintiff to amend his petition so as to reduce the amount in dispute to a sum less than five hundred dollars. After the application for removal was regularly made, the circuit court had no jurisdiction to proceed further with the cause. (Kanouse vs. Martin, 15 How., 198.)

Nor did the plaintiff waive the question of jurisdiction by participating in the subsequent trial of the cause. (Insurance Co. vs. Dunn, 19 Wall., 214; Gordon vs. Longest, 16 Pet., 97; Hereford vs. Ins. Co., 42 Mo., 148.)

The circuit court having proceeded to try the case in violation of law, it would be improper to enter into any examination of the merits of the controversy.

The fact, that the defendant might have pursued another remedy, will not prejudice his right to a reversal of the judgment of the circuit court by this court, for the reasons before stated.

The judgment of the circuit court will be reversed, and the cause remanded, with instructions to enter an allowance of the petition of the defendant for the removal of the cause to the circuit court of the United States for the western district of Missouri, *nunc pro tunc*. All the other judges concur, except Judge Vories, who is absent.

AMANDA CORBY, Respondent, *vs.* FRANK M. TRACY, Appellant.

1. *Justice's judgment—Revival by executrix—Citation—Lapse of more than ten years—Construction of statute.*—Execution cannot issue on a justice's judgment by reason of its revival in the name of an executrix, as provided by Wagn. Stat., 830, § 5, after three years from the date of the rendition of the judgment against the testator. In order to have execution in such case, the judgment must be revised as provided by Wagn. Stat., § 7, 8 and 9, pp. 830, 831.

2. *Judgment—Courts of record—Justices—Revival—Scire facias—Limitations.—statute of.*—A *scire facias* may issue to revive a justice's judgment after the lapse of ten years. The statute of limitations applies only to judgments of courts of record. (Humphreys vs. Lundy, 37 Mo., 320.)

3. *Justices' judgments—Execution—Scire facias—Transcript—Lien—Statute, construction of.*—The statute (Wagn. Stat., 830, § 6), prohibiting a party from suing out an execution on a justice's judgment more than three years after its rendition, when such judgment had not been revived, refers exclusively to the issuing of executions by justices, and has no application to proceedings on a transcript filed in the office of the clerk of the circuit court. The lien will attach from the time the transcript is filed, with like effect as upon a judgment from the date of its rendition. (Carpenter vs. King, 42 Mo., 219.)

4. *Justices' judgments—Transcript—Filed thirteen years after rendition of judgment—Status of.*—*Quære*, can an execution be issued at any time within ten years after the filing of the transcript of the judgment of a justice's court, (in this case, the transcript being filed thirteen years after the rendition of the original judgment), or must the circuit court take cognizance of the existence of the original judgment, prior to the filing of the transcript in the office of the circuit clerk?

5. *Practice, civil—Supreme Court—Bill of exceptions—Motion to quash execution.*—This court will not consider a motion to quash an execution, when it is not embodied in the bill of exceptions.

Appeal from Buchanan Circuit Court.

Doniphan & Reed, for Appellant.

I. The judgment was more than ten years old in October, 1871, and could only be revived by a suit at law, and no execution could issue, (Wagn. Stat., 791, § 11) and being in the circuit court, it was to be treated as a judgment of that court. (Bauer vs. Bauer, 40 Mo., 61; King vs. Carpenter, 42 Mo., 219.)

B. R. Vineyard, for Respondent.

I. The motion to quash the execution not being a part of the record, and not being saved in the bill of exceptions, the Supreme Court will affirm the decision of the lower court. (State vs. Wall, 15 Mo., 208; London vs. King, 22 Mo., 336; Blount vs. Zink, 55 Mo., 455.)

II. This execution, being returned not satisfied, on that day, became *functus officio*, and being returned by the officer, no motion could, after that, be entertained to quash it.

HOUGH, Judge, delivered the opinion of the court.

On the 30th day of August, 1860, a judgment was rendered by a justice of the peace of Buchanan county, in favor of John Corby, and against the defendant, Tracy. On the 26th day of October, 1871, and after the death of said Corby, a citation was issued by the justice, under the provisions of the 5th section of article 6, Wagn. Stat., relating to justice's courts, requiring the defendant to show cause why said judgment should not be revived in the name of the plaintiff as executrix of John Corby. The defendant appeared to the citation, and on the 8th day of November, 1871, said judgment was by the justice revived in the name of the plaintiff. A transcript of the judgment as revived was filed in the office of the clerk of the circuit court of Buchanan county on the 10th of March, 1873. Execution was issued thereon on the 13th day of July, 1874, and was on the same day levied on certain personal property of the defendant, for which a delivery bond was given. This execution was returned unsatisfied on the 7th day of September, 1874, the return day thereof, without any sale thereunder. On the 26th day of September, 1874, and during the term to which the execution was returnable, the defendant filed a motion to quash said execution, which was overruled, and he has brought the case here by appeal.

Passing by the question, whether the motion to quash was proper under the circumstances of this case, it having been made after the return of the execution, and omitting for the present any reference to another point, which is fatal to the defendant's case, we proceed to notice one objection made by him to the judgment of the court below, chiefly for the purpose of calling attention to the want of appropriate legislation on the subject.

It is contended by the defendant, that under the citation issued in favor of plaintiff, as executrix, in October, 1871, the judgment was not, and, being more than ten years old, could not have been, revived under the statute, and that no execu-

tion could have been legally issued thereon by the justice, or by the circuit clerk after the transcript was filed in his office.

It must be conceded, that the proceedings before the justice in October, 1871, would not have afforded sufficient authority to that officer for issuing an execution on the judgment in the name of the plaintiff, as more than three years had then elapsed since the rendition of the judgment; and the citation was not issued, nor were the proceedings thereunder had, with a view of reviving the judgment and having execution thereon as provided in sections seven, eight and nine of the act relating to justices' courts above cited. But the defendant is wrong in supposing that a judgment in a justice's court cannot be revived in the mode pointed out in the last named sections, after the lapse of ten years. That point was expressly decided otherwise in the case of Humphreys vs. Lundy (37 Mo., 320), which was affirmed in Sublett vs. Nelson (38 Mo., 487). It was there held that a *scire facias* under the code, to revive a justice's judgment, may issue after the lapse of ten years, and that the statute of limitations applies only to judgments of courts of record. It was further held in Carpenter vs. King (42 Mo., 219), that the provisions of our statute, prohibiting a party or his legal representatives from suing out execution on a judgment of a justice's court more than three years after its rendition, when such judgment had not been revived, refer exclusively to the issuing of executions by justices of the peace, and have no application to proceedings on a transcript filed in the office of the clerk of the circuit court. And it was then said, that the "import and intention of the statute is clear, and that is, that the lien should attach from the time the transcript is filed, for the same length of time and with like effect as upon a judgment from the date of its rendition." The execution was issued from the circuit court in that case in a little more than three years after the rendition of the judgment of the justice.

At the time the transcript in the present case was filed with the circuit clerk, the justice's judgment was valid and binding, though a *scire facias* was necessary in order to have

execution, and after such *scire facias* execution might have issued at any time within the three years next ensuing. What was the status of this judgment when it became a part of the records of the circuit court? If it should be treated as a judgment of the circuit court rendered at the date it was filed in the clerk's office, execution might be issued thereon at any time within ten years after such filing, and the judgment in the present case would thereby be kept alive for a period of twenty-three years, thus carrying it beyond the period at which, in analogy to the statute in relation to judgments and decrees of court of record, it might be presumed to be satisfied. And on the same principle the existence of justices' judgments be much further prolonged.

On the other hand, if notice must be taken in the circuit court of the previous existence of this judgment for the period of thirteen years prior to the filing of the transcript, no execution could be issued from the circuit court, and no *scire facias*, as both are limited to ten years after judgment. The judgment would thus become of less value than it was before the transcript was filed. The difficulties of the case are patent, and we have thus called attention to them with the hope that some remedy may be provided by the appropriate department of the government. We are relieved of the necessity of prescribing a rule in such cases. The plaintiff has urged upon our attention the fact, that the motion to quash the execution, even though it should be considered a proper step in the cause, is not embodied in the bill of exceptions; and under our previous decisions it cannot be considered. (State vs. Wall, 15 Mo., 208; London vs. King, 22 Mo., 336; Blount vs. Zink, 55 Mo., 455.)

The judgment of the circuit court must, therefore, be affirmed. Judges Napton and Sherwood concur. Judges Wagner and Vories absent.

PHILANDER A. HUXLEY, Defendant in Error, *vs.* ALBERT G. HARROLD, Plaintiff in Error.

1. *Attachment, levy of, on real estate—Writ from another county—Filing abstract—Sess. Acts* 1863-4, *p.* 7.—Prior to the act approved Feb. 11th, 1864 (Sess. Acts 1863-4, p. 7), it was not necessary for a sheriff, levying an attachment on a writ coming from another county, to file an abstract of his levy in the Recorder's office of his county.

2. *Attachment, levy of, on real estate—Notice to tenants—Sheriff's return.*—The sheriff's return of a levy of attachment on real estate need not state the notice to tenants, or that there were no tenants on the land. The statutory notice to tenants is not simultaneous with the act of levying the writ. (Lackey vs. Seibert, 23 Mo., 85; Durossett's Adm'r vs. Hale, 38 Mo. 346.)

3. *Judgments—Attachment—Defendant, appearance of—Land levied on in another county.*—When a suit is instituted by attachment, and the defendant appears and defends, a general judgment is the only one authorized by the statute (Wagn. Stat., 189, § 40), and it need not recite any judgment lien, and the status of the case is not altered by reason of the land being in another county.

4. *Sheriff's deed—Acknowledgment of, before the judge.*—The acknowledgment of a sheriff's deed is good which states "on the —— day before the Judge of the circuit court within and for the —— county aforesaid, in court judicially sitting, appeared," etc. (McClure vs. McClurg, 53 Mo. 173.)

5. *Attachment—Execution, sale under—What title passes.*—A sale under an execution on a suit brought by attachment conveys the title of the debtor, legal or equitable, to the land, discharged of all incumbrances created by him subsequent to the levy of the writ of attachment. [Wagn. Stat., 184, § 18; Lackey vs. Seibert, *supra;* Ensworth vs. King, 50 Mo. 477.]

6. *Practice, civil—Suits where to be brought—Real estate—Statute, construction of.*—The statute (R C., 1855, p. 1221, § 3) directing that suits affecting real estate shall be brought in the county, where the land or a part thereof is situated, refers to suits in equity, ejectment and the like, and not to attachment suits.

7. *Practice, civil—Attachment, suit by, where to be brought—Statute, construction of.*—Under the revised code of 1855, (p. 1221, § 2; p. 244, § 20) suits by attachment could be brought in any county where the defendant had property, real or personal, and separate writs might issue to other counties in which he had property.

8. *Presumption—Courts of general jurisdiction—Acts collaterally called in question.*—Where the records of courts of general and common law jurisdiction are silent, and nothing is apparent thereon showing absence or lack of jurisdiction; jurisdiction will be presumed as a matter of law when collaterally called in question.

Error to Andrew Circuit Court.

Doniphan & Baldwin, with W. S. Greenlee, for Plaintiff in Error.

The sheriff's deed was inadmissible, because there was no record introduced upon which to found it, and it was not properly acknowledged. (Wagn. Stat., 612, § 56.) There being no proper record in Andrew county, the deed could not be evidence of title to this land, unless supported by the whole record. (Samuels vs. Sheldon, 48 Mo., 444.)

The deed undertook to show that an attachment had been issued in 1864, and levied on this land, but the execution did not show it nor did the judgment so state. (35 Mo., 239; 36 Mo., 115.)

II. The judgment and execution were general and did not pretend to affix any lien of attachment, and the sheriff had no authority to so set out in his deed.

III. The mortgage to Wells, the sale under it, and deed to Nelson, were all before the judgment and sale. (Davis vs. Ownby, 14 Mo., 170; Valentine vs. Havener, 20 Mo,, 133; Reed vs. Ownby and Guy, 44 Mo., 204.)

IV. By the act of Feb. 11, 1864, an abstract of all attachments was to be filed in the recorder's office where the real estate is situated. By limitation of the act it was not to go into force until April 1st, 1864, yet it was evidently intended to protect innocent purchasers, and all writs of attachment should be recorded, after that time, to carry out the provisions of the law. It was in full force on the 18th of March, 1864, but it gave until April 1st. to file such an abstract.

V. The attachment could only effect the equity then had, and not the legal title afterwards acquired. (31 Me., 177; Drake Attach., § 234; 32 Mo., 512.)

VI. In order to retain the lien from the date of levy, it is necessary to have a special as well as a general judgment enforcing the lien, when the land is in another county.

VII. The return of the sheriff of Andrew county failed to show any notice to the tenant—or return there was no tenant—and could not constitute a valid attachment. (R. C. 1855, p. 244, § 22.)

VIII. By sec. 2, p. 1221, of statute of 1855, suits of attachment must be brought in the county where the land lies. This act was passed Dec. 12th, 1855, and must be held as construing the 20th section of the attachment law (R. C. 1855, p. 244), which was approved Dec. 8th, 1855. If the law is construed to apply to personal property, then both sections can stand; otherwise the 20th section (p. 244) must give way to the positive terms of the 2nd and 3d sections (p. 1221).

Section 3 of 1855 is imperative as to when suit shall be brought.

In case there had been land in Buchanan county, a writ could have issued to another county, but there is no evidence that Hartzell ever had real property in Buchanan county.

Allen H. Vories, for Defendant in Error.

I. The act of Feb. 11, 1864, taking effect April 1st, 1864, was the first legislation of this State, requiring the abstract of the levy of attachment to be filed.

II. This levy of the attachment created a lien upon the land in controversy from the moment of the levy, and a sale, under the execution issued upon this judgment, relates back to the levy and passes the title to the plaintiff, unaffected by any incumbrances created, or conveyances made, subsequent to such levy. (Davenport vs. Lacon, 17 Conn., 278; Shacklett vs. Glyde's appeal, 14 Pa. St., 326; Zeizenhager vs. Doe, 1 Ind., 296; Pierson vs. Robb, 4 Ills., Scam., 389; Lyon vs. Sandford, 5 Conn., 544; Harrold vs. Feet, 5 Iowa, 141; Franklin F. Ins. Co. vs. West, 8 Watts. & S., 350; Taylor vs. Mixten, 11 Pick., 341; Scott vs. Manchester, 44 N. H., 507; Porter vs. Champion, 5 Conn., 544; Bradley vs. French, 28 Vt., 546; Emmerson vs. Upton, 9 Pick., 168; Morton vs. Dryden, 6 Ill. [Gill.], 187; Henry vs. Mitchell, 32 Mo., 512; Ensworth vs. King, 30 Mo., 477; Lackey vs. Seibert, 23 Mo., 85; Crittenden vs. Legerdofer, 35 Mo., 239; Foster vs. Patton, 37 Mo., 525; Durossett vs. Hale, 38 Mo., 346; Hardin vs. Lee, 51 Mo., 241.)

III. The failure of the sheriff to notify the tenants, if any there were, could not affect the plaintiff's title. (Lackey vs. Seibert, 23 Mo., 94; Durossett vs. Hale, 38 Mo., 346.)

SHERWOOD, Judge, delivered the opinion of the court.

Ejectment for land in Andrew county. Conrad Hartzell is the common scource of title. Plaintiff claims under a sheriff's deed, based on an attachment proceeding instituted by himself against Hartzell in the Buchanan Common Pleas on the 18th of March, 1864. This deed bears date December 12th, 1872, and recites a general judgment recovered by Huxley against Hartzell, in the Buchanan circuit court, May 21st, 1872, and execution issued thereon, October the 3rd. of that year, and a sale thereunder to plaintiff on the 7th of December next thereafter. Plaintiff at the trial produced evidence tending to show title from the United States to one Wykoff, and from the latter to Hartzell by deed delivered in May, 1866, when $800, the remaining purchase money, was paid. Hartzell, having in 1861 paid $1000, received a title bond and entered into possession of the premises in controversy.

The defendant, who is the tenant of one Cole, introduced evidence having a tendency to show title in the latter, by means of a mortgage deed dated in June, 1870, executed by Hartzell to Wells, a sale under the power contained in the mortgage, and a deed made by Wells to Nelson, in execution of the power, in January, 1872, a deed from the latter, in the same month, to one John Cole, and a deed from the latter, made in April, 1872, to L. G. A. Cole, the landlord of defendant. Evidence was also introduced, tending to show good faith and no knowledge by either Wells, Nelson, or the Coles, of any incumbrance, or attachment lien, on the premises in dispute.

The cause was tried by the court, without a jury; no declarations of law were asked, and the finding was for the plaintiff. This case therefore depends solely upon the sufficiency of the attachment proceedings instituted against Hartzell.

I.

Prior to the act approved, February 11, 1864 (Sess. Acts, 1863–4, p. 7), which went into effect April 1st of that year, the sheriff, who levied a writ of attachment sent from another county, was not required to file an abstract of his levy in the recorder's office. This being the case, and the attachment writ, under which plaintiff's claims, having been, as the evidence shows, levied on the 18th of March, 1864, there was no necessity for filing an abstract in the office of the recorder; as, if filed, it would have been a mere nugatory act, and imparted notice to no one. For this reason, the non-filing of an abstract of the attachment levy cannot be held to have impaired the rights or lien acquired by such levy.

II.

Nor can the validity of the levy be affected by the failure of the sheriff's return to recite notice to tenants of the land, or by failure to state there were no tenants. The statutory notice to tenants is not simultaneous with the act of levying the writ, and cannot, therefore, be regarded as constituting a part of the levy. (Lackey vs. Seibert, 23 Mo., 85; Durossett's Adm'r vs. Hale, 38 Mo., 346.)

III.

As Hartzell, if not served with personal process, appeared to, and defended, the action, a general judgment was the only one authorized by the statute. (Wagn. Stat., 189, § 40.) In consequence of this statutory requirement, it was wholly unnecessary for the judgment to recite any attachment lien in order to impart additional efficacy to that lien. And the *status* of the case was not altered, as has been suggested, by reason of the land being in another county.

IV.

The sheriff's deed to plaintiff was regular on its face, and was therefore *prima facie* evidence of the truth of the recitals which it contained (McCormick vs. Fitzmorris, 39 Mo., 24; Ellis vs. Jones, 51 Mo., 180). And it was quite immaterial that the deed went further, and made recital of the date and levy of the writ of attachment, as this fact was estab-

lished by the officer's return. And no valid objection can be urged to the certificate of acknowledgment to that deed. It recites, that, "on the 12th day of December, 1875, before the judge of the circuit court within and for the county of Andrew aforesaid, in court judicially sitting, appeared," etc. (McClure vs. McClurg, 53 Mo., 173.)

V.

It is well settled in this State, that the levy of a writ of attachment, when properly issued, creates a valid charge or lien on the land against all persons from the moment of the levy, so that a sale upon the execution relates to that time, and passes the title to the purchaser divested and discharged of all subsequent incumbrances made by the debtor. (Lackey vs. Seibert, *supra;* Ensworth vs. King, 50 Mo., 477.)

And the result is the same whether the debtor possesses a legal or an equitable interest in the land at the time of levy made. For under our law, the latter, as well as the former, class of interests are attachable. (Wagn. Stat., 184, § 18.)

And in the case at bar, Hartzell's equitable interest having, because of his paying the residue of the purchase money and receiving a deed, ripened into a perfect legal title, such legal title would inure to the benefit of whomsoever became the purchaser at judicial sale.

The case before us does not require, and therefore we shall refrain from, the discussion of the question, as to what the effect would have been, had Hartzell mortgaged the land prior to the acquisition of the legal title, and had, subsequent to that incumbrance, made such acquisition by the payment of the remaining purchase money and the reception of a deed.

VI.

The last point remaining to be discussed is a jurisdictional one. It is alleged, on behalf of plaintiff, that Hartzell, who, it seems, at the time resided in Buchanan county, was possessed of personal property there, which was levied on also under a writ of attachment directed to that county.

It is tacitly conceded on the part of defendant that this was the case, though a very patient search through this most wretched record fails to disclose anything indicative of the truth of the assertion; but it is insisted, that unless Hartzell had real property in Buchanan county, which was also attached, the court acquired no jurisdiction over that in Andrew county, and we are referred in support of this position to R. S. 1855, p. 1221, §§ 2, 3, which provide, that suits, commenced by attachment against the property of a person, shall be brought in the county where "such property" may be found, and that "suits concerning real estate, or whereby the same may be affected, shall be brought in the county where such real estate or some part thereof, is situated." The latter section evidently has no reference to attachment suits (which do not directly concern or affect real estate); but applies to suits in equity, ejectment and the like. And in the provisions of section 2, *supra*, are embraced all descriptions of property real or personal; and these provisions of this section are in conformity with those of § 20, Art. 1, chap. 12 of the Attachment Act (1 R. S. 1855, p. 244), which provides, that when the defendant "has property or effects" in different counties, that "separate writs may issue to every such county." It will be readily seen from an examination of the provisions of §§ 2 and 20, *supra*, that suits by attachment may be instituted in any county where the defendant "has property or effects," and that it is wholly immaterial whether the property in the county in which the suit is commenced is real or personal or both; the statute makes no distinction, and we are certainly authorized to make none.

Taking it then, as conceded, that a writ of attachment was issued to Buchanan county and levied on personal property therein, we do not entertain a doubt as to the validity of the levy of the attachment on the property in dispute. But even if the above mentioned concession had not been made, even if it be true that no record evidence was adduced at the trial showing that personal property of Hartzell was attached in Buchanan county, still it by no means follows that

plaintiff's title is not valid. For the circuit court of Buchanan county, in which the judgment was rendered, which consummated and confirmed the attachment lien, was a court of general and common law jurisdiction, and the better doctrine seems to be that, where the records of such courts are silent, and nothing is apparent thereon, showing absence or lack of jurisdiction, that their jurisdiction will, as a matter of law, be presumed, when collaterally called in question.

Here the record before us of the attachment proceedings is silent as to whether a writ of attachment did issue to, and was levied on, the property of Hartzell in the county where the suit was brought, but since there is nothing in that record showing absence of jurisdiction, the law will intend that the writ issued and was levied in Buchanan county, and that, in consequence of this, jurisdiction existed.

There are numerous authorities sustaining this view. Thus it is said in Peacock vs. Bell, (1 Saund., 73,) that "the rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of the Supreme Court, but that which specially appears to be so."

To the same effect see Grignon vs. Astor, (2 How., [U. S.], 318;) Granger vs. Clark, (22 Me., 128;) Hart vs. Seixas (21 Wend., 40) and cases cited, Pennington vs. Gibson, (16 How., [U. S.] 65;) Wells vs. Mason, (4 Scam., 84;) Morgan vs. Burnet, (18 Ohio, 535;) Reynolds vs. Stansbury, (20 Id., 344;) Horner vs. Doe (1 Ind., 130,) and cases cited, Prince vs. Griffin, (16 Iowa, 552;) Freeman Judg. (§ 124) and cases cited, Freeman vs. Thompson (53 Mo., 192,) and cases cited, State to use vs. Williamson, (57 Mo., 198,) and cases cited.

For the foregoing reasons the judgment should be affirmed. Judge Vories, absent; the other judges concur.

JOSEPH H. FEURT, Plaintiff in Error, *vs.* LOREN G. ROWELL, Interpleader, etc., Defendant in Error.

1. *Chattel mortgage—Record—Possession by mortgagor—Removal of property.*—If a chattel mortgage is recorded (Wagn. Stat., 281, § 8), the mortgagee's title is not affected by the retention of the possession of the property by the mortgagor nor by his removal of it, and, if the mortgage is good here, it will be good in every State to which the property may be removed.
2. *Chattel mortgage—Record—Possession by mortgagor after condition broken.*—When a chattel mortgage is recorded, the possession of the mortgaged property by the mortgagor after condition broken is not *per se* fraudulent.
3. *Chattel mortgage—Extension of time—Neglect to enforce lien—Connivance—Rights of third parties.*—The mere extension of time by a mortgagor, or his neglect to enforce his lien under the chattel mortgage, will not destroy his rights, nothing more appearing; and there being no fraudulent connivance between mortgagor and mortgagee, and the rights of third parties not being interfered with.

Error to Daviess Circuit Court.

Conover & Hicklin, for Plaintiff in Error.

By reason of plaintiff's diligence and interpleader's negligence, the former obtained priority of lien, and was entitled to be first satisfied out of the property attached. (Bruce vs. Vogel, 38 Mo., 100; Sto. Eq., § 421.)

Shanklin, Low & McDougal, for Defendant in Error.

I. The deed was recorded in the county in which the mortgagor resided, and the removal of the property from the county to another did not destroy the lien of the mortgage. (Wagn. Stat., 281, § 8; Bevans vs. Bolton, 31 Mo., 439.) Nor would the removal out of the State of the mortgaged chattels invalidate the mortgage. (Smith vs. Hutchings, 30 Mo., 380.) The law presumes notice to all persons from the date of the filing of the mortgage for record. (Miller vs. Whitson, 40 Mo., 97.)

II. The possession of the mortgaged property by the mortgagor after the condition broken was not fraudulent. (Kansas City Sav. Ass. vs. Mastin, 61 Mo., 435; Miller vs. Bascom, 28 Mo., 352; Miller vs. Whitson, 40 Mo., 95; Howell vs. Bell, 59 Mo., 135.)

The creditor was not injured by the delay. (Bump Fraud. Con., 99; Frost vs. Mott, 34 N. Y., 253.)

WAGNER, Judge, delivered the opinion of the court.

The record discloses these facts. The plaintiff sued one Sweaney by attachment before a justice of the peace, and caused certain mules to be seized by virtue of the writ. Defendant Rowell filed an interplea claiming the mules. On the trial of the interplea before the justice, Rowell was defeated and appealed to the Circuit Court. On the trial there it was shown, that on the 17th day of December, 1874, Sweaney executed a chattel mortgage conveying the mules in controversy to Rowell to secure a note due in ninety days, which note was, as the mortgage recited, given as collateral security to idemnify Rowell for signing the note of Sweaney at bank.

On the 14th of March, 1875, and before the note in bank matured, Rowell, for the purpose of favoring Sweaney, and enabling him to pay off the debt, by a written endorsement on the note in bank upon which he was surety, consented that an extension of ninety days might be granted thereon, which was done. On or about the 17th day of June, 1875, Rowell paid off the note, on which he was surety for Sweaney. In the meanwhile, on or about the first of June, 1875, plaintiff sued out an attachment against Sweaney, who it seems had departed for Iowa, and followed him into Harrison county and brought the mules back into Daviess county, where the mules were seized under the writ of attachment as the property of Sweaney. At the time of the seizure, the mortgage was on record in Daviess county, and Sweaney was a resident of that county when the mortgage was made. The cause was tried before the court sitting as a jury, and for the interpleader the court gave declarations as follows: 1st. The fact, that the interpleader did not take immediate possession of the mules when the note became due, will not preclude his recovery. 2nd. The fact, that Sweaney was about to remove the mules out of the State will not avoid the lien of the mortgage.

The plaintiff asked three instructions, the substance of which was, that if the mortgage became due in March, 1875, and from that time until June, 1875, and until after the attachment in this cause was levied on the mules at the instance of the plaintiff, Sweaney was allowed to keep the mules in his possession, then the possession of the mules by Sweaney was, as against the plaintiff, fraudulent, and the judgment should be against the interpleader. The court refused plaintiff's instruction, and then rendered judgment for the interpleader.

By the 8th section of the act in reference to fraudulent conveyances, it is provided, that no mortgage or deed of trust of personal property shall be valid against any other person than the parties thereto, unless possession of the mortgaged or trust property be delivered to and retained by the mortgagee or trustee, or *cestui qui trust*, or unless the mortgage or deed of trust be acknowledged or proved, and recorded in the county in which the mortgagor or grantor resides, in such manner as conveyances of lands are by law directed to be acknowledged or proved and recorded. (Wagn. Stat., 281.)

By this section, if the mortgagor retains the possession of personal property, it is sufficient if the mortgage be recorded in the county in which the mortgagor resides. And it has been held that the removal of the mortgagor with the personal property to another county will not affect the title of the mortgagee, nor his right to the possession for the purpose of paying his debt (Bevans vs. Bolton, 30 Mo., 437); and if the mortgage is valid here, it would be valid in any State to which the property might be removed. (Smith vs. Hutchings, 30 Mo., 380.) The fact that a mortgagor of personal property, where the morgage is recorded, remains in possession of the property, is no evidence of fraud; the record is, in such a case, equivalent to a transmutation of possession. (Miller vs. Bascom, 28 Mo., 353; Miller vs. Whitson, 40 Id., 97.)

The mortgage was recorded in the county in which the mortgagor resided, and imparted full notice to every one,

who was or might become interested. The removal of the property to another county did not destroy the lien. Had the property been removed out of the State, the mortgage would not thereby have been invalidated. The retention of the possession of the mortgaged property by the mortgagor after condition broken was not *per se* fraudulent.

The mere extension of the time of payment, or neglect by the mortgagee to enforce his lien, would not destroy his rights, nothing more appearing; and there is nothing in this case to show, nor is it pretended, that there was any fraudulent connivance between the mortgagor and mortgagee. The plaintiff was not injured by the delay, and we are not aware of any principle that would deprive the mortgagee of his lien for granting a favor to his debtor, when the rights of other persons were not interfered with.

We have no hesitation in coming to the conclusion, that the judgment should be affirmed, and it is accordingly so ordered.

All the judges concur, except Judge Vories, who is absent.

WILLIAM PRUITT, Respondent, *vs.* THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY, Appellant.

1. *Railroads—Stock, transportation of—Receipt of, what implied.*—The reception of hogs in the pens of a railroad company for transportation is equivalent to an obligation to transport them without unnecessary delay.
2. *Railroads—Monopoly by government—Common carriers, duty of.*—If the government monopolizes a railroad, to relieve itself from liability the company should abdicate its functions as a common carrier for the public at large.
3. *Common Carriers—Railroads—Probable business—Duty as to providing for.*—When a common carrier can reasonably judge of the demands probably to be made on it, in addition to its ordinary business, it is presumed to have made arrangements to meet such demands without interfering with its ordinary business.
4. *Railroads—Station agents, power of, to contract for freight.*—Station agents are to be presumed to have power to make contracts for their railroads for the transportation of freight. The limitations on their powers the public cannot take notice of, unless they are conveyed to the public in such a manner as to authorize the inference that shippers are apprised of them.

5. *Common carriers—Contracts—Unforeseen occurrences.*—Common carriers are excused from literal performance of their contracts if unforeseen occurrences, such as the law recognizes as sufficient, should occasion slight delays.
6. *Contracts, breach of—Damages, what allowable.*—The damages to be allowed on a breach of contract must be such as are foreseen, or might be foreseen, as likely to result from a breach of the contract or obligation assumed or implied.
7. *Railroads—Transportation—Snow storms—Delays.*—Snow storms of such violence as to obstruct the passage of trains must be allowed to excuse delays by a railroad in transporting articles during the continuance of the obstruction.
8. *Practice, civil—Trials—Stock, exposure of—Injury—Question for jury.*—Whether exposure of hogs in uncovered pens, for twenty-five days in December, might not reasonably be expected to result in considerable loss from exposure and smothering, is a proper question to be left to the jury.
9. *Railroads—Stock, transportation of—Negligence, when prima facie.*—A delay of twenty-five days in shipping one drove of hogs, and of forty-one days in shipping another drove, might be termed *prima facie* negligence on the part of the railroad, inexcusable unless by the total cessation of all business for the pubilc.
10. *Damages—Act of God—Concurring negligence.*—The latest decisions of this court incline to the opinion, that where the negligence of the defendant concurs in and contributes to the injury, he is not exempt from liability on the ground that the immediate damage is occasioned by the act of God or inevitable accident.

Appeal from Caldwell Circuit Court.

James Carr, for Appellant.

I. There was a very sudden and great influx of business thrown upon the road for transportation far exceeding its capacity. This was a legal excuse for not shipping the hogs with promptness. (Balentine vs. North Mo. R. R. Co., 40 Mo., 491; Wilbert vs. N. & E. R. R. Co., 12 N. Y., 245; Galena & Chicago Union R. R. Co. vs. Rae, 18 Ill., 489; R. R. Co. vs. Reeves, 10 Wall., 176; Denny vs. N. Y. C. R. R. Co., 13 Gray, 481; Morrison vs. Davis, 20 Penn. St., 171; Clark vs. Pac. R. R. Co., 39 Mo., 184.)

II. Such snow storms and such unheard of cold weather constitute a legal excuse for failing to ship the respondent's hogs. (See authorities cited *supra*.)

III. The United States monopolized the road, as it had a right to do by the road's charter, for the transportation of

troops or munitions of war, in preference to all other persons. (Act of incorporation of appellant, approved Feb. 16, 1847.)

IV. The plaintiff's instructions presented an *ex parte* view of the case to the jury. (Goetz vs. Han. & St. Jo. R. R. Co., 50 Mo., 472; Sawyer vs. Same, 37 id., 240; Clark vs. Hammerle, 27 id., 55; Thomas vs. Babb, 45 id., 384; Mansfield vs. Corbin 2 Cush., 151.)

V. The plaintiff's fourth and fifth instructions lay down no legal measure of damage to guide the jury in assessing damages, and should have been refused. (Clark vs. Pacific R. R. Co., 39 Mo., 184; Balentine vs. N. M. R. R., 40 Mo., 491.)

VI. The plaintiff's sixth instruction is a departure from the issues made by the petition and answer, alleging favoritism in shipping which is not alleged in the petition. It is calculated to mislead the jury. (Balentine vs. N. M. R. R. Co., 40 Mo., 491; Moffatt vs. Conklin, 35 Mo., 453.)

VII. The seventh instruction is erroneous in that it ignores the shrinkage of the hogs on account of the excessively cold weather, and the acts of the hogs themselves, in bunching, piling and smothering each other. The effect of this instruction is not counteracted by the giving of an instruction on the same point at the request of the appellant. (Goetz vs. H. & St. J. R. R. Co., 50 Mo., 472.)

VIII. A carrier of goods or cattle is only bound to carry in a reasonable time under ordinary circumstances, and is not bound to use extraordinary efforts, or incur extra expense in order to surmount obstructions caused by the act of God; as a fall of snow. (Bradden vs. Great Northern Rly., 28 L. J., 51; 2 L. T., 94; Redf. Car., § 305.)

Shanklin, Low & McDougal, for Respondent.

I. After receiving the hogs mentioned in the first count of plaintiff's petition, and agreeing to ship them, the defendant was absolutely bound to carry out the contract or respond in damages for a breach thereof. The matters of ex-

cuse pleaded in the answer constituted no defense. The act of God or the public enemy will excuse the performance of a duty imposed by law, but not an obligation growing out of a voluntary contract. Events, against which the parties could have provided in their contract, cannot be set up as an excuse for the non-performance of that contract. (Collier vs. Swinney, 16 Mo., 484; Taylor vs. St. Bt. Robert Campbell, 20 Mo., 254; Hand vs. Baynes, 4 Whart., 214; Harmony vs. Bingham, 1 Duer., 209; Davis' Adm'r vs. Smith, 15 Mo., 467; School Dist. vs. Danchy, 25 Conn., 530; Ang. Carr., § 294; 2 Redf. Railw., 162; Add. Torts [1 Am. ed.], 991, 992.)

II. It was no excuse that the delay was occasioned by an unusual accumulation of freight along the line of defendant's road. (Faulkner vs. South Pacific R. Co., 51 Mo., 311; Tucker vs. Pac. R. Co., 50 Mo., 386; Denning vs. G. T. R. Co., 48 N. H., 455; 2 Am. Rep., 267; 2 Redf. Am. Railw. Cas., 393; Han. & St. Jo. R. R. Co. vs. Swift, 12 Wall., 262.)

III. If it was true that the government was making large demands on the company for the transportation of military supplies and troops, the defendant would have been justified in refusing to receive freight offered in excess of the capacity of its rolling stock, but was no excuse for not forwarding that received. (Ill. Cent. R. R. Co. vs. Cobb, 64 Ill., 128; Ill. Cent. R. R. Co. vs. McClelland, 54 Ill., 58; Porcher vs. Northeastern R. R. Co., 14 Rich. [S. C.] Law, 181; Patterson vs. North Carolina R. R. Co., 64 N. C., 147.)

IV. The station agent was clothed with the powers usually conferred upon station agents, or at least, if his powers were limited, the company kept the fact a profound secret. (Denning vs. Grand Trunk R. R. Co., *supra;* Watson vs. Memphis & C. R. R. Co., 1 Cent. L. J., 358, Supreme Court of Tenn., not yet reported; 2 Redf. Railw., 4 ed., 127, § 182.)

V. The act of God which will excuse in such a case must be the sole cause of the injury; if negligence of the carrier contributes to the injury he is liable. (Wolf vs. Am. Ex. Co.,

43 Mo., 491; Armentrout vs. St. L., K. C. & N. R. R. Co., 3 Cent. L. J., 235; Read vs. Same, 60 Mo., 199; Mich. Cent. R. C. vs. Curtis, 8 Chicago Leg. News, 228; Condict vs. Grand Trunk R. R. Co., 54 N. Y., 500; Seigel vs. Eisen, 41 Cal., 109.)

NAPTON, Judge, delivered the opinion of the court.

This was an action for damages alleged to have been occasioned by the defendant's negligence and breach of contract and failure of duty as a common carrier.

The evidence of the plaintiff tended to establish the following facts: The plaintiff's son, as agent for his father, applied to the station agent of defendant at Hamilton, some time prior to the 1st of December, 1863, for transportation of about three hundred live hogs, and the agent agreed with or promised the plaintiff's son, that the hogs should be transported to Macon between the 1st and 10th days of December. The hogs were driven to the station, and on the 1st of December placed in the stock pens of the company. None of the hogs were shipped until about the 25th of December, and in the meantime about fifty head died in the pens by exposure to a snow storm, which occurred about the middle of the month, and for want of shelter, and about one-third of the hogs were killed by the plaintiff and shipped on coal cars, and by deterioration, consequent upon this mode of transportation, brought one-half of the market price. The expenses attending the delay, by feeding, cost of hands, etc., are stated in the evidence; but need not be detailed here, as no question arises in regard to such matters.

About the 12th of December, 1863, a second contract was made with the agent at Hamilton for the transportation of about eight hundred hogs on the 14th or 15th of December. This second lot of hogs was driven to within about ten miles of the station on the 14th or thereabouts, when the agent of defendant sent word to the plaintiff not to bring them in, as they were crowded and could not ship them for a while. These hogs were kept in the neighborhood, shifting around

to procure corn, till the 1st of February, 1864, upon assurances by the station agent, from time to time, that they would soon be able to transport them, until the plaintiff finally drove them on foot to Macon, a distance of one hundred miles, which occupied about fifteen days, thus arriving at Macon about the 15th of February.

There was proof of a loss of about one hundred and fifty hogs of the second lot, during this interval from the 20th of December to the 15th of February. The expenses incurred were also in proof. The loss of these hogs was occasioned partly by cold during the storm of snow in January, and piling, and partly from the usual accidents in driving, and by shrinkage, etc.

The petition charges not only negligence, but favoritism to other parties, and that the hogs of plaintiff were not taken in regular turn from the depot in their order of priority.

The defense relied on in the answer, and also in the testimony, was: 1. the unusual influx of freight along this road in the winter of 1863–4, especially of hogs, and the inability to furnish rolling stock sufficient to take all the hogs offered in a reasonable time; 2. the demands of United States government for transportation of military supplies and soldiers, and, 3. the remarkable and unprecedented snow storm which occurred this season; and nearly all the evidence of defendant is directed to these points. It does not appear, however, that the snow storm of the 15th of December stopped the passage of trains, but that the storm of the 31st December did stop the trains for from ten to fifteen days.

I ought to add, in regard to the defenses, that the plea of the statute of limitations was also interposed to bar a recovery.

The jury on the instructions found for the plaintiff, and assessed his damages on the first and second counts (which referred to the two lots of hogs heretofore mentioned) at $7,500. A remittitur was however entered for $2,000, and the verdict then stood at $5,500, and the court then refused to set it aside.

The following instructions were given for the plaintiff:

1. It was the duty of defendant to receive all live stock which was offered at Hamilton during the months of November and December, 1863, and to take, transport and deliver the same without unnecessary delay, according to contract.

2. If the jury believe from the evidence, that at any time within five years next before the 14th day of March, 1868, plaintiff offered for shipment at Hamilton, Missouri, a lot of live hogs, and that defendant's station agent at Hamilton accepted said hogs into the pens of defendant at Hamilton, for shipment, then no lack of rolling stock for shipping said hogs, nor the fact that the rolling stock was used by order of the military authorities of the United States, will amount to a sufficient excuse for failing to ship said hogs without unnecessary delay; and in that case, if the jury shall further find, that defendant failed to ship the hogs so received into said pens without delay, then the jury will find for plaintiff on the first count of the petition, unless the jury shall further believe from the evidence, that the defendant was prevented from shipping said hogs within a reasonable time solely by reason of a storm of snow and wind of unusual severity.

3. If the jury believe from the evidence, that in the month of December, 1863, E. T. Pruitt, acting for plaintiff, and defendant, by its station agent, E. N. Sleeper, made a verbal agreement, by the terms of which plaintiff was to deliver for shipment at Hamilton, Missouri, within three days thereafter, eight hundred hogs; and that said Sleeper was to accept and ship said hogs upon their receipt; and that said Sleeper refused to accept and ship said hogs, and notified plaintiff not to deliver said hogs; then the jury will find for the plaintiff in the second count of the petition.

4. If the jury find for the plaintiff on the first count of the petition, they will assess the damages at such amount as they may believe from the evidence resulted to plaintiff directly from defendant's failure to ship the hogs mentioned in said first count, not exceeding $4,000.

5. If the jury find for the plaintiff on the second count of the petition, they will assess his damages at such amount as they may believe from the evidence resulted to plaintiff directly from the failure of defendant to accept and ship the hogs mentioned in said count, not exceeding $10,000.

6. The jury are instructed, that, as common carriers, it was the duty of the defendant to so distribute its rolling stock among the various stations on its road, as to afford a fair and reasonable proportion of such rolling stock to shippers at each station, regard being had to the usual amount of freight offered at such station for shipment; and if the jury believe from the evidence, that unjust discrimination was made against shippers at Hamilton Station in this regard, and that such discrimination resulted in the damage to plaintiff complained of, they must find for plaintiff, even though there was no contract on the part of the defendant to ship plaintiff's hogs in proof.

7. If the jury find for the plaintiff, in estimating his damages they will allow him such damages as may fairly and reasonably be considered as arising naturally—that is, according to the natural course of things—from the breach of defendant's contract or duty, and which did from such breach; and if by reason of defendant's negligence or breach of duty, the property was deteriorated and reduced in value by storm, frost or any destructive agency of ordinary occurrence, the plaintiff is entitled to recover all the damages he has sustained thereby, not exceeding the sum of fourteen thousand dollars.

8. The jury must find separately on each count in plaintiff's petition, and if they find for plaintiff on the first count, the verdict may be in the following form: We, the jury, find for the plaintiff on the second count in his petition and assess his damages at ——— dollars.

And if the jury find for plaintiff on the second count their verdict may be in the following form: We, the jury, find for plaintiff on the second count in his petition and assess his damages at ——— dollars.

9. If the jury find for plaintiff, they may allow him interest on the damages found, at any rate not exceeding six per cent., from the date at which such damages accrued to and were sustained by him.

The following instructions asked by the defendant were given by the court:

2. The jury are instructed as to damages, in case they find for plaintiff on either the first or second count of plaintiff's petition, that if they believe from the evidence, that said hogs, or any of them, died from freezing, or the effects of excessive cold weather, or were smothered by piling together in consequence of such cold weather, or died from the want of proper care on the part of the plaintiff, or the person having them in charge, they will not include the value of such hogs in their assessment of damages.

3. The jury are instructed as to damages, in case they find for plaintiff on either the first or second count of plaintiff's petition, that if they believe from the evidence, that the loss from shrinkage in weight of said hogs, or any of them, was occasioned by insufficient feeding or want of proper care on the part of plaintiff, or the person having charge of them, or solely by the effect of excessive cold weather, they will not include any such loss in their assessment of damages.

10. If the jury believe from the evidence, that the failure of the defendant to ship plaintiff's hogs, mentioned in the first count of his petition, was in consequence of an unusual fall of snow, which filled the cuts along defendant's road and rendered it impassable, or that in consequence of unusually cold weather and great depth of snow, defendant's engines were frozen up and rendered useless for shipping purposes, they will find for defendant, provided they believe from the evidence, that defendant was diligent and used all ordinary means to overcome such obstacles, and shipped said hogs as soon as its road was passable, in their proper turn or order, at the station where said hogs were received.

The following instructions asked by defendant were refused:

1. The jury is instructed, that there is no evidence before them which is sufficient in law, if true, to warrant them in finding a verdict for plaintiff on either the first or second count in plaintiff's petition founded on a supposed special contract.

4. The jury are instructed that, if they believe from the evidence that previous to the month of November, 1863, the defendant had furnished and had on said road sufficient accommodation and rolling stock for the transportation of all freight and live stock that was ordinarily and generally offered for transportation on its said road within a reasonable time after the same were offered, and that during said months of November and December, 1863 and January, 1864, the defendant kept all of its available accommodation and rolling stock employed with reasonable diligence in receiving and for transporting the freight and live stock that were offered for transportation on said road, and that during said months of November, December and January, there was an unusual influx of business and an extraordinary press of freight and live stock for transportation on the road beyond the capacity of the road and all accommodation and rolling stock to receive and transport immediately and at once; and that while the said hogs of plaintiff were waiting to be received in turn after they were offered for transportation in the order of time and priority in which they were so offered, there occurred along the line of said road a severe and unusual snow storm and great cold, obstructing the operation of said road, hindering it from thereafterwards receiving and transporting said hogs of the plaintiff in the order of time and priority in which they were offered for transportation, then defendant is not liable on the ground and for the reason merely that the plaintiff's hogs were not received and transported in the exact order of time and priority in which they were offered, in view of the operations and business of the whole road at all stations, junctions and shipping places there.

5. Should the jury believe from the evidence, that defendant, through its agent, Sleeper, contracted with plaintiff to

ship the hogs mentioned in the second count of the petition by or on the 14th day of December, 1863, yet, if the jury further believe from the evidence, that defendant was prevented from doing so by reason of an unusual influx and press of freight and live stock for transportation on the road beyond the capacity of the road, and all accommodations and rolling stock of said road, and also, by the occurrence, along the line of said road, of a severe and unusual snow storm, and great cold, obstructing the operations of said road and hindering it from receiving and transporting said hogs of plaintiff according to such contract, then defendant is not liable on the ground and for the reason that plaintiff's hogs were not received and shipped at the time called for by such contract, and the jury will find for the defendant.

6. If the jury believe from the evidence, that defendant was prevented from receiving and shipping the hogs of plaintiff mentioned in the first count of the petition by an unusual influx and an unusual press of freight and live stock and United States troops, horses and mules, forage stores and provisions for transportation, beyond the capacity of the road, and all accommodations and rolling stock on said road, and, also, by the occurrence, along the line of said road, of a severe and unusual snow storm and great cold, obstructing the operation of said road and hindering it from receiving and transporting said hogs of plaintiff, then defendant is not liable on the first count in the petition, and the jury will find for the defendant.

7. If the jury believe that more than five years elapsed between the 14th day of December, 1863, and the 27th day of February, 1873, the time of the filing of plaintiff's amended petition, the jury will find for the defendant on the second count of the second amended petition.

8. If the jury believe from the evidence, that the cause of action stated in the second count of plaintiff's petition accrued to plaintiff more than five years before the filing of plaintiff's amended petition, which was filed February 27th, 1873, they will find for defendant.

9. If the jury believe from the evidence, that, after the contract by the defendant's agent at Hamilton to ship the hogs mentioned in plaintiff's second count (in his petition), and before the delivery of said hogs by plaintiff to defendant, there was an unusual influx of freight caused by the United States government shipping over defendant's road large quantities of military stores and troops, which monopolized defendant's rolling stock, engines, cars, and means of transportation, or that there was an unusual influx of freight from other sources actually delivered to defendant for shipment to the extent that rendered defendant unable to receive and ship plaintiff's hogs mentioned in said second count, then defendant had a right to refuse to receive plaintiff's hogs, and defendant is not liable under said second count, provided notice of defendant's inability to receive and ship said hogs was given to plaintiff before he had gone to any expense on the strength of said contract.

11. If the jury find for plaintiff, in assessing damages they will not include any amount for hogs that were frozen to death, or smothered to death by being overlaid by other hogs.

The first two instructions are not seriously objected to, and it is difficult to see any ground upon which objections could be raised. They relate to the first delivery of hogs in the pens of the defendant, and merely require that they shall be forwarded without unnecessary delay. They further assert, that the lack of rolling stock, and its subjection by the charter to the preferred claims of the government, constituted no excuse for the detention, but concede, that the defendant is not responsible for any delay occasioned by a snow storm and unusual wind. These instructions are certainly more favorable to the defendant than the evidence justified, since there was evidence of an express contract made by the agent, that the hogs should be forwarded by the 10th of December, and there was no proof of any unusual snow storm or wind previous to this date, and if there had been, it should at least have been stated in the instruction, that the storm

and wind were of such a character as to stop the running of the trains.

The instruction was, we think, right in leaving out of view the insufficiency of the defendant's rolling stock, and its preoccupation by the United States military authorities. The reception of the hogs in the pens of the company (omitting all consideration of the promise or contract of the station agent) was equivalent to an obligation to forward without unnecessary delay. If the government monopolized the road, the company should have abdicated its functions as a common carrier for the public at large. But the agent is presumed to have been acquainted with the condition of the rolling stock, and the ability of the company to forward the freight received in at least a reasonable time, barring inevitable accidents from obstructions to the road by storms, etc. The company is also supposed to be acquainted with the prior claims of the government, and it was its duty, as a common carrier, to provide for the accommodation of private citizens as well as the government. The civil war had been, at the date of these contracts, in December, 1863, and January, 1864, in progress for upwards of two years, and the defendant must be presumed by this time to have ascertained to a reasonable extent the probable claims of the government on its road for transportation, and to have made provision for such demands without interfering with the ordinary business of the road. And the same may be said of the alleged increase in the crop of hogs in the vicinity of the road, a matter of which companies engaged in the business of transportation are not likely to be ignorant.

Indeed, it may be observed, without undertaking to give even the substance of the evidence on this subject, that it was of the most indefinite character, giving no statistics, no facts, but merely general statements of a great increase of the hog crop in the country tributary to this road, and a great increase in this branch of the business of the road, which, together with the severity of the winter, were claimed to absolve the company from its obligations as a common carrier.

If such generalities as these are allowed to absolve railroad companies from all their duties to the public, either arising from contract, or implied by the law, the law in regard to the duties of common carriers, sanctioned, as it has been, by centuries of experience, would afford a mere illusory protection to the public who deal with transportation companies.

With regard to the third instruction, which is based on the hypothesis of a contract between the plaintiff and the station agent, it is urged here, that such agents have no power to make such contracts. The general understanding of the country undoubtedly is, that such agents are placed there for the express purpose of receiving and forwarding freight, and making such contracts in reference thereto as they are authorized by the company to make.

The fact that, in a particular instance, the agent exceeds his authority by making engagements, which his principal's instructions forbid, is certainly a matter of which the public cannot take notice, unless conveyed to the public in such a manner as would authorize the inference that shippers are apprised of the restrictions. It is difficult to see how the business of a railroad could be successfully conducted, in regard especially to live stock, unless the owners have a right to rely on the representations of the station agents as to the time in which to deliver their stock. It is convenient to both parties that such power should be given to the agents, as stock dealers would be placed in a position which might subject them to unnecessary expense, if not informed, at least within a reasonable time, of the day when it will be convenient for the railroad to transport the stock. Such engagements, like all other engagements, may be excused from literal performance, undoubtedly, if unforeseen occurrences, such as the law recognizes as sufficient, should occasion slight delays. (Derring vs. Grand Trunk R. R. Co., 48 N. H., 455; 2 Redf. Railr., 113; 18 Eng. Law & Eq. R., 557; Sto. Ag., §§ 443, 127; 42 N. H., 125; 47 Id., 554.)

The third instruction, which was in reference to the second drove of hogs, in number about 800, was not framed in con-

formity to the proofs, although as an abstract proposition it was sufficiently correct. At least the defendant has no reason to complain of it. There was no evidence that the station agent positively refused to accept the hogs, but that he advised the plaintiff to keep the drove where it then was in the neighborhood of Hamilton, intimating that he would soon be able to forward them. Had there been a peremptory and unconditional refusal, the plaintiff might have immediately done what he had ultimately to do, to-wit, drive his hogs on foot to Macon City. But, at repeated interviews with the agent, the hope was held out, that the press of business would soon be over, and that the hogs would soon be forwarded, thus occasioning a delay of the plaintiff, in that neighborhood, from the 20th of December to the first of February, a period of 41 days.

There is no question of the propriety of the fourth, fifth and seventh instructions for the plaintiff. These instructions were, however, subsequently qualified or explained by the second and third instructions given for the defendant, which excluded from the consideration of the jury any estimate in their damages of the hogs that died from freezing, or the effects of excessive cold weather, or from piling or smothering in consequence of the cold weather.

It is probable from the course of the plaintiff in entering a remittitur for $2,000, which was about the value of the hogs proved to have died from these causes, that the jury disregarded these instructions for the defendant, and in their damages included their value; but as the remittitur removed any objections on this score, the defendant has no cause of complaint.

We would not be understood, however, as concurring altogether in the views of the circuit court, as indicated in these instructions for the defendant, although they have the sanction of very respectable authorities. It is not deemed necessary, or appropriate to the position of the present case, seeing that the circuit court adopted the views most favorable to the defendant, that the subject of proximate and remote damage

or damages, which the negligence of the defendant, concurring with the "act of God" produces, should be investigated or determined. It may be well, however, to observe that the latest decisions of this court (Wolf vs. Am. Exp. Co., 43 Mo., 421, and Reed vs. St. Louis, K. C. & N. R. R. Co., 60 Mo., 199) evidently incline to the position adopted by the courts of New York, and adhered to by the courts of that State in repeated cases, notwithstanding the decisions in Pennsylvania and Massachusetts in Morrison vs. Davis (20 Pa., 171), and Denny vs. N. Y. Cent. R. R. (13 Gray, 481), and the subsequent decision of R. R. Co. vs. Reeves, made by the Supreme Court of the United States in 10 Wallace, 176. The commission of appeals in New York, in 1873, in view of all decisions to the contrary, including these I have just referred to, upon a re-examination of the subject, adhere to their former opinions in Michaels vs. N. Y. Cent. R. R. (30 N. Y., 564), and Read vs. Spalding (30 N. Y., 630), and Bailwick vs. Balt. & Ohio R. R. (45 N. Y., 712). In all these cases in New York it is held, that where the negligence concurs in and contributes to the injury, the defendant is not exempt from liability on the ground that the immediate damage is occasioned by the act of God or inevitable accident.

The case of Clark vs. Pacific R. R. Co. (39 Mo., 184) is not inconsistent with the views expressed in the later cases in this court I have referred to. There Judge Holmes observed, that "though the act of God, or of the public enemies, be in itself a good defense, yet, if the loss be directly brought about by reason of the negligence or want of proper care of the party himself, it would not excuse him. In such case the negligence or want of reasonable care and foresight might be deemed the proximate cause of the loss. And if it had been made to appear that the conductor knew of the immediate presence of the hostile forces, and had reason to believe that his train could go safely through on that day, but that there was danger that the train would be attacked and destroyed on the next day, and that he had for that reason left the plaintiff's goods behind and taken other goods instead to

make sure of their safety, and then, without reasonable care and foresight, proceeded with the plaintiff's goods on the next day in the face of the impending danger, there might have been some ground on which the defendant could have been held liable." (p. 191.)

The general doctrine on this subject of damages is undoubtedly correctly stated in the instructions given for the plaintiff, that damages in such cases can only be such as may fairly be supposed to enter into contemplation of the parties when a contract is made, or a duty assumed, and such as might naturally be expected to follow its violation. In other words, the damages must be such as are foreseen, or might be foreseen, as likely to result from a breach of the contract or obligation assumed or implied.

It appears strange, that a violent snow storm, or excessive cold weather, should be regarded as extraordinary events in the latitude of this road in North Missouri, during the months of December or January. I should rather suppose, that the absence of such storms during these winter months would be out of the range of ordinary experience. Of course, such storms, when of sufficient violence or duration to obstruct the passage of trains, must be allowed, as the circuit court in this case allowed, to excuse delays during the continuance of such obstructions. Whether the detention of two or three hundred hogs in uncovered pens for twenty-five days, during the month of December, might not ordinarily and reasonably be expected to result in considerable loss from exposure and smothering, is a question, I think, which might have been left to the jury. The second and third instructions for the defendant excluded all losses of this character from their consideration.

Most, if not all, of the cases in New York and in this State, where the carrier has been held responsible for damages resulting from negligence in exposing the property to unforeseen accidents, are cases in which the property has been actually received on the trains, and bills of lading given. But in Denning vs. Grand Trunk R. R. Co. (48 N. H., 455) that

was not the case, and the goods were merely delivered to the agent at the depot, under a promise that they should be forwarded immediately, but were never forwarded at all; and, yet, the court held the carrier responsible for all the damages that resulted from this delay. It is difficult to distinguish that case from the present, so far as the loss of the fifty hogs in the pens at the depot of defendant is concerned.

Upon the whole, we think the instructions in this case were sufficiently favorable to the defendant. In truth the delay of twenty-five days in relation to the first drove of hogs, and of forty-one days in regard to the second, to say nothing of the fifteen days consumed in driving to Macon City, might be termed *prima facie* negligence, inexcusable unless by the total cessation of all business by the company for the public. There were at least fifteen days in the early part of December when no obstruction appears, so far as the evidence is concerned; and deducting the ten or fifteen days in January, during which the road was blocked by snow, there were still from the 20th December to the 1st of February twenty-six days in which the defendant was engaged in transportation.

It is unnecessary to notice the question of the statute of limitations, because the record does not contain the original petition, and there is nothing to show that the amendment embraced a new cause of action.

Judgment affirmed. All the other judges concur, except Judge Vories, who is absent.

HENRY MILLER, Respondent, *vs.* JOSHUA H. DRAKE, Appellant.

1. *Evidence—Pleadings, fact admitted by.*—When a fact is admitted by the pleadings, evidence to prove it is properly excluded.
2. *Practice, civil—Trials—Instructions—How many to be given.*—Where the instructions given, whether at the instance of the parties, or on the court's own motion, substantially cover the case, all other instructions may well be refused.

Appeal from Livingston Circuit Court.

Jonas J. Clark, for Appellant.

H. M. Pollard, for Respondent.

NAPTON, Judge, delivered the opinion of the court.

This action was brought to recover of the defendant, who was plaintiff's agent in the sale of land, a sum of money alleged to have been fraudulently retained by the agent, upon a false representation of the price at which the land was sold.

The plaintiff and his brother, who both lived in Ohio, owned 200 acres of land in Livingston county, of which the plaintiff owned 80 acres and his brother 120 acres, and they gave the defendant a power of attorney to sell the land at any price, not less than eleven dollars per acre. The petition alleges that the tract was sold at $15 per acre, and that the sale at the price of $11 per acre was reported to the plaintiff, and this defendant retained $4 per acre, or $320, which he had no right to retain; and the suit was to recover this sum and interest.

After an answer and replication, the issues were submitted to a jury.

The defendant objected to any evidence being introduced, on the ground that no cause of action was stated in the petition. This was overruled and evidence on both sides was given.

The evidence for plaintiff tended to show, that the defendant sold the land to one Deems for $15 an acre in December, 1868; that no written contract was made, and no conveyance made directly to Deems; but that in the early part of the succeeding year conveyances were made to Norville, a son-in-law of defendant, and by Norville to Deems. The conveyance to Norville was upon the consideration of eleven dollars per acre, and that of Norville to Deems was for fifteen dollars per acre. The sale was reported by defendant to plaintiff as a sale at eleven dollars per acre.

The defendant gave evidence to show, that the sale to Norville was fairly made and consummated before any negotiation with Deems. The testimony of the parties, plaintiff and defendant, and of Norville, was admitted without objection.

The defendant, in addition to the statements of Norville and himself, offered to prove that the plaintiff was very old and could neither read nor write, and that all his business was transacted by his son and one Kettle, who had an interest in the 120 acres, which defendant sold, and then offered to read various letters from Kettle to defendant, and letters from defendant to Kettle, to show that he had authority to trade with Norville at eleven dollars per acre, and that he closed the trade by their assent, and that he advised them duly of such sale, and that they ratified it. This evidence was offered in various shapes, and as one of the objections to it was, that the answer set up no such defense, an amended answer was proposed; but the court refused to permit the answer to be so amended, and refused to permit any of the evidence. Exceptions to this ruling were duly taken.

The court gave three instructions for plaintiff:

1. That, unless the sale to Norville was in good faith and consummated before the sale to Deems, the plaintiff was entitled to a verdict.

2. This instruction was the stereotyped one about the right of juries to disregard witnesses who swore falsely.

3. That, unless they believed the Norville contract was in good faith, and not for the purpose of enabling the defendant and Norville to hold said land and sell at an advance, they should find for plaintiff.

4. That, if the sale to Norville was made with an understanding between Drake and Norville, whereby said land was to be sold to Norville nominally, but was really to be sold to some other party at a price greater than eleven dollars per acre, and the excess to be retained by said Drake or Norville, then said sale to Norville was not in good faith, although fifty dollars was paid on it.

5. The damages are $320 with interest at the rate of 6 per cent. from January 16th, 1869.

And the court further instructed the jury at the instance of defendant:

1. That, unless the plaintiff has established by a preponderance of testimony, that defendant Drake, as the agent of plaintiff, sold said land to Deems for $15 per acre, and fraudulently retained $4 per acre of the price, they will find for defendant.

2. If defendant Drake sold the land to Norville in good faith on his, defendant's, part before the sale to Deems, and transmitted to plaintiff his part of the purchase money, less defendant's commission, the jury will find for defendant.

And the court further gave this instruction of its own:

"If the jury believe, that in the month of July or August, 1868, or about that time, and before the alleged sale to Deems, the defendant, as the agent of the plaintiff, made a contract for the sale of the land in question to Wm. S. Norville, and that said contract was fully consummated and reduced to writing, and signed by the said Norville and said defendant, as agent of plaintiff, and was made in good faith on the part of defendant to secure the sale of the lands described in the petition, and not for the purpose of enabling Norville or defendant to make anything out of the sale of said land fraudulently as against the rights of the plaintiff, the jury will find for defendant."

The jury found a verdict for the plaintiff, and a judgment was given in accordance with the verdict.

It could answer no useful purpose to notice all the objections that are made in this court to the verdict and judgment. The material points seem to be these:

1. It is said that the petition contained no cause of action. The petition originally contained a full explanation of the facts upon which the liability of the defendant was based; but, upon the motion of the defendant, this introductory or preliminary statement was stricken out. It was not essential to show a cause of action, but might very well have been allowed to remain by way of inducement. The plaintiff and his brother owned the land sold by defendant, who was a real

estate agent. The plaintiff owned only 80 acres of the 200 acres sold, and, of course, was only entitled to recover for the difference between the price of the 80 acres sold, which he owned, and the price at which it was actually sold. The petition, as amended, sufficiently sets forth this claim, and it could not be doubted that this is a good cause of action.

2. The rejection of the evidence in regard to Kettle's agency for plaintiff, and in regard to plaintiff's incapacity to read and write, and the evidence based on this, of correspondence between Kettle and defendant, and of the offer of a great number of letters to show that defendant communicated to Kettle his sale to Norville at $11 per acre, and that Kettle favored the sale and sanctioned it, we think was right.

There was no question in this case that defendant had the right to sell to Norville or any one else at $11 per acre. The power of attorney expressly authorized such a sale. There was no need of letters from Kettle or plaintiff's son, or any other person acting for plaintiff to establish this proposition. It was conceded in the petition. The question was, whether any such sale took place. No ratification was necessary to make such sale valid. The defendant had an unquestioned right to sell the land at $11 per acre. The question was not as to his legal right to sell at this price, but as to the fact whether he did really sell at this price; whether the sale to his son-in-law was a sham or a *bona fide* transaction. The question was, was the sale a pretended one or a *bona fide* one, and based on no arrangement between the defendant and his son-in-law.

The correspondence excluded had no connexion with the point in issue. In case where fraud is alleged, a great latitude is allowed; but we are unable to see any bearing whatever which the excluded evidence could have had on the point in issue.

3. The instructions given in this case presented the question of fact for the determination of the jury. This was a very simple question, and hardly any mistake of law could have been committed. We have copied the instructions given,

and we cannot readily imagine any objection to them. The defendant asked a multitude of instructions, which were refused; but they were substantially given, so far as they were right. The court might well have refused all the instructions of both sides, and yet, the instruction given on the court's own motion covered the case. The question for the jury was simply, whether, on the evidence, the transaction with Norville was a *bona fide* sale, or a mere disguise to enable the defendant to realize an anticipated advance. This question was fairly left to the jury, and their verdict was well warranted by the evidence.

We will, therefore, affirm the judgment. The other judges concur. Judges Vories and Wagner absent.

THOMAS D. GEORGE, Appellant, *vs.* WILLIAM MIDDOUGH, Respondent.

1. *Judgments—Loss or destruction—How restored—Common Law—Notice.*—Lost or destroyed judgments (prior to the legislative enactment on that subject) might be restored or proved at common law, but in every such case the opposite party should be notified.
2. *Summary proceedings—Motions—Notice.*—Whenever a party's rights are to be affected by a summary proceeding or motion in court, he must be notified in order that he may appear.
3. *Judgments—Record book, destruction of—Revival—Scire facias—Nul tiel record.*—The destruction of the record book, in which the judgments are written, does not destroy the judgment debts, and though the judgments are wrongfully restored by the court without notice to the debtors, yet, when the judgments are revived by *scire facias* with notice to the debtors, then they should make their objection by plea of *nul tiel* record.
4. *Judgments—Revivals of—Executions—When outlawed—Statute, construction of.*—A judgment was obtained in 1859, was revived from time to time, the last revival being in 1867, and execution was issued in 1872. *Held*, that the execution was a nullity, being issued more than ten years after the date of the judgment (Wagn. Stat., 791, § 11), and that the lien of the *scire facias* expired before the execution issued. (Id., 790, § 4.)

OPINION OF SHERWOOD, J.

The judgment being revived from time to time, the execution could rightfully issue, and that a purchaser at the sale would take title under it.

Appeal from Caldwell Circuit Court.

C. S. McLaughlin, for Appellant.

I. The destruction of the record of the judgment did not destroy the judgment. If the proceedings to restore the record were void, then in 1862, when *scire facias* was issued to revive the judgments, said judgments were in the same situation as they were the following day after the burning of the records, and a *scire facias* may issue on a destroyed judgment. (Strain vs. Murphy, 49 Mo., 337.)

II. Execution may issue at any time within ten years from the time such judgment may have been revived by *scire facias*, otherwise there might be a lien with no means of enforcing it. (Wagn. Stat., 790, §§ 4, 5; Id., 791, § 11.)

L. E. Carter, for Respondent.

I. The restoration of the destroyed record of judgments, rendered in 1859, was void, no petition having been filed for that purpose, and no notice having been served on defendants.

E. O. Hill, for Respondent.

I. The proceedings to restore the lost records were utterly void. (Gen. Stat., 1865, pp. 183, 184, §§ 14 and 15.)

II. The executions were issued more than ten years after the rendition of the judgments. (Gen. Stat., 1865, p. 636, §§ 4–8, 11.)

Wagner, Judge, delivered the opinion of the court.

It appears from the record that in 1859 certain judgments were rendered against defendants, and that in 1860 the records of the judgments in the county were destroyed by fire, including the judgments in question. At the next term of the court after the destruction by fire, the judgments were restored by order of the court, but this restoration was made on motion of plaintiff's attorney without any notice whatever being given to defendants and without bringing them into

court. The judgments were revived from time to time till 1867, the last renewal being in this last named year.

In February, 1872, executions, were issued upon the judgments, and defendant's lands were levied upon and sold, and plaintiff became the purchaser.

Plaintiff relied upon the sheriff's deed for title, and the court excluded it for two reasons. First, because the proceedings in 1860 to restore the judgments were void; and secondly, because no execution could issue upon the judgments after ten years had elapsed from their rendition.

The proceedings in 1860 to restore the judgments were long prior to the legislative enactment, upon that subject, requiring the adverse parties to be brought in by summons, and therefore that act cannot be made applicable to this case. Lost or destroyed judgments might be restored or proved at common law, but in every such case the opposite party should be notified.

It is a cardinal principle, that whenever a party's rights are to be affected by a summary proceeding, or motion in court, that party should be notified, in order that he may appear for his own protection.

The destruction of the record book, on which the judgments were written, did not destroy the judgment debts (Strain vs. Murphy, 49 Mo., 337), and although the court wrongfully restored the judgments, when the defendants had no notice, and were not in court, yet when the revivals took place by *scire facias*, they were regularly brought in, and they should then have made their objection by a plea of *nul tiel* record. (Wood & Oliver vs. Ellis, 10 Mo., 382; Ellis vs. Jones, 51 Mo., 181.)

But there is another objection which is fatal to the plaintiff's case. Executions can only issue upon a judgment within ten years after its rendition (Wagn. Stat.. 791. § 11). The judgments were rendered in 1859, and the executions, on which the sales were made, and under which the plaintiff purchased, were not issued till 1872, twelve years after the rendition of the judgments. Now the statute provides, that

the plaintiff or his legal representatives may at any time, within ten years, sue out a *scire facias* to revive a judgment and lien; but after the expiration of ten years from the rendition of the judgments, no *scire facias* shall issue (Id., 790, § 4). The last judgment of revival on *scire facias* was in 1867, and its lien had expired before the executions were issued; the executions therefore derived no force from these liens, or the revivals had under them, and as more than ten years had expired from the time the original judgments were rendered, the executions were nullities. (4 Litt. 310.)

It follows that the judgment below must be affirmed.

Judges Napton and Hough concur; Judge Vories absent. Judge Sherwood holds, that in consequence of the revival of the judgments from time to time the executions could rightfully issue, and that the plaintiff took title at the sale.

CASTLEREIGH C. HAWKINS, Plaintiff in Error, *vs.* JOHN C. MASSIE, *et al.*, Defendants in Error.

1. *Practice, civil—Pleadings—Demurrer—Amended petition—Motion—Final judgment.*—An amended petition was substantially the same as a prior one to which a demurrer had been sustained, and a motion was made to strike it out, which it seems was sustained, when the court, the plaintiff declining to plead further, rendered judgment for the defendant on the demurrer theretofore sustained. *Held*, that the court could not act on the prior petition as it had been superseded by the amended one, and that judgment had not been rendered on the motion.

Error to Buchanan Circuit Court.

B. R. Vineyard, for Plaintiff in Error.

Collins & Loan, for Defendants in Error.

SHERWOOD, Judge, delivered the opinion of the court.

The case presented by the record is shortly this:

This cause came to the Buchanan circuit court by change of venue from the Holt circuit court. On its arrival an

amended petition was filed, and new parties defendant brought in thereby. Demurrers were sustained to this petition, though no formal judgment was entered. Plaintiff obtained leave to file a second amended petition, which he did at a subsequent term. The second amended petition was, with a few slight changes, of the same general tenor and effect as the first amended one. A motion was filed by defendants to "strike out" this second amended petition. This motion it seems was successful, though no final judgment was entered thereon. This entry, however, which has reference to the motion, appears of record.

"Come now the parties in the above entitled cause by their respective attorneys, and the motion to strike out the second amended petition of said plaintiff, is now here taken up, argued and submitted to the court, and is by the court sustained; and the said plaintiff failing to file any further pleadings in this cause, and electing to stand on the pleadings herein, final judgment is now here by the court rendered for the said defendants upon the demurrer to plaintiff's petition heretofore sustained in this cause. It is therefore considered and adjudged by the court, that said plaintiff take nothing by his writ," etc., etc.

Now it is quite evident, that there is no judgment on the motion. The above entry is an anomaly in legal procedure. When an amended petition is filed, the former petition is at once superseded, or else the very end designed by the amendment fails of accomplishment. The court therefore did not possess the power to pass upon pleadings, which in legal contemplation had no longer an existence. And inasmuch as the motion was not passed upon, and is yet pending and undetermined in the lower court, we shall dismiss the writ of error for that reason.

Judge Vories absent, the other judges concur.

THOMAS DOUGHERTY, Respondent, *vs.* THE ST. LOUIS, KANSAS CITY & NORTHERN RAILWAY CO., Appellant.

1. *Practice, civil—Trial—Separate counts—Verdict.*—Where there are several counts in a petition, but all are ignored on the trial except one, and a verdict is found on that one, such verdict is good.

Appeal from Chariton Common Pleas.

L. H. Waters, for Appellant.

Isaac H. Kinley, with J. C. Crawley, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

The only grounds of objection raised in this court are, that the petition was insufficient, and that there was no separate finding on each of the several counts. The petition alleged the incorporation of the defendant, and the first count alleged the delivery to it of goods by the plaintiff at St. Louis, to be carried and transported to him at Keytesville, and set out the value thereof. The second count was in all respects similar to the first, and stated another lot of goods, and their value. The third count stated, that on the 14th day of April, 1873, at the Keytesville depot in Chariton county, the defendant, in consideration of a reasonable compensation, agreed to be paid to it by the plaintiff, agreed to store and safely keep in its warehouse at said Keytesville depot certain merchandise, the property of the plaintiff, of the value of $1,822.04, which goods and merchandise were fully described in the exhibits filed with the first and second counts, until the same should be called for by the plaintiff, and then deliver the same to the plaintiff at his request; that defendant neglected to take proper care of the merchandise, and through the negligence of itself and servants the same was wholly lost to the plaintiff, wherefore judgment was prayed, etc.

An answer was filed out of time, which was stricken out, and then by agreement of parties a jury was waived, and an inquiry of damages was had before the court. There is an agreement of record signed by the attorneys of both parties, that the goods and merchandise mentioned in the first and

second counts are the same as those claimed for in the third count.

The court, after hearing evidence, gave judgment for the plaintiff on the third count for the amount therein claimed.

The first and second counts were defectively drawn, but there was enough stated to render them good after verdict. But they are not before us for review, for they seem to have been ignored upon the trial, and there was no finding or judgment upon them. The whole trial was upon the third count, and that sufficiently stated a cause of action. It is readily conceded, that the pleading was not framed on scientific principles, and is wanting in that precision of averment which ought to characterize a good petition, but there was enough, under our statute, to support it after verdict. And therefore the judgment cannot be reversed.

It is not pretended that the defendant had a meritorious defense, and its assignments of error are too technical and refined.

Let the judgment be affirmed. All the judges concur, except Judge Vories, who is absent.

GEORGE P. FUNKHOUSER, Respondent, *vs.* JAMES MALLEN, Appellant.

1. *Practice, civil—Pleadings—Answer—Ejectment—Swamp lands of county—Sheriff, power of, to sell revoked—Defenses.*—The answer in an ejectment suit alleged that plaintiff's deed was made by the sheriff for the land in controversy, sold by him as county swamp land after the county court had revoked his authority to sell it. (Wagn. Stat., 867, § 3.) *Held*, that this was a good defense.
2. *Practice, civil—Pleadings—Ejectment—Answer—Plaintiff's title, denial of—Innocent purchaser for value—Allegations.*—When the answer in an ejectment suit alleges that the deed, under which plaintiff claims, is void, it is not necessary to allege that plaintiff had notice of defendant's title, nor by the omission of such allegation is it admitted that plaintiff is an innocent purchaser for value.
3. *Practice, civil—Pleadings—Allegations.*—Propositions, not contained in the allegations of the pleadings, cannot be considered.

4. *Practice, civil—Supreme Court—Errors of record—New trial, motion for—In arrest, motion for.*—Where the error of the trial court is patent of record, it is not necessary to move for a new trial, but the appellant has a right to have the action of the trial court reviewed on the motion in arrest of judgment.

Appeal from Clinton Circuit Court

William Henry, for Appellant.

I. Plaintiff had no right to recover as the case stood on the pleadings, it being alleged that the sale to plaintiff was void. (Craft vs. Merrill, 14 N. Y., 456; Durfee vs. Moran, 57 Mo., 374; Durette vs. Briggs, 47 Mo., 356.)

II. The answer did not admit or show a good title in plaintiff.

J. M. Lowe, J. E. Merryman and T. J. Porter, for Respondent.

The appellant having failed to file a motion for a new trial, it is now too late to question the acts of the court. (Brady vs. Connelly, 52 Mo., 19.)

Sherwood, Judge, delivered the opinion of the court.

Ejectment for certain land in Clinton county. Petition filed in October, 1873.

The answer was a general denial of the allegations of the petition, and, as an additional defense, set forth in substance, that the land in question was purchased in 1855 of the county, as swamp land, by Thos. Rose, who received a conveyance therefor in 1867; that Rose immediately on his purchase took possession and exercised acts of ownership till the day of his death; that in December, 1872, under proceedings instituted for partition by the heirs of Rose, deceased, the land was sold and defendant became the purchaser at $480; received a deed from the sheriff; that by virtue of said deed defendant took, and has remained in, possession ever since, exercising acts of ownership; that, after possession thus taken by defendant, the county court ordered the land in controversy to be sold as swamp land, but

subsequently rescinded such order; that the sheriff was duly notified of such revocation of his authority to sell, but notwithstanding, he, falsely pretending to have authority, sold the land at public sale for a nominal sum to plaintiff, who received a deed from the commissioners of the county, under the direction of the county court, for the tract in controversy, as well as other tracts purchased by plaintiff at the same sale; that the tract in question was, by the inadvertence of the county court, or of the commissioner, inserted in the deed thus delivered to plaintiff; and that, but for the mistake thus occasioned, said tract would not have been inserted in the deed under which the plaintiff claims. All the material allegations of the answer were denied by the reply.

At the trial, the defendant declining to hold under the statute of limitations, the plaintiff verbally moved the court for judgment, on the ground that the answer admitted the plaintiff's title, and set up no defense to the cause of action. This motion was successful, and judgment went accordingly.

The defendant moved in arrest, urging as grounds, that upon the record the judgment was erroneous, and that the answer contained a good defense. This motion was unsuccessful, and defendant has appealed.

The action of the trial court was clearly erroneous; erroneous because the authority of the sheriff to sell having been revoked, as alleged in the answer, the case stood precisely as if the county court had never in the first instance authorized him to sell; his act was therefore void, as it was only by reason of the order of the county court that the sheriff was empowered to act. (Wagn. Stat., 867, § 3.) Under these circumstances it was simply impossible that the plaintiff should occupy the attitude of a purchaser without notice. And it was consequently unnecessary for the answer to allege that the plaintiff had notice of defendant's title; nor did the answer by failing to charge notice on the plaintiff, thereby admit that he occupied the position of an innocent purchaser for value. The silence of the answer on this point is not to be construed as such admission, nor as conceding that the

plaintiff had acquired the title; that was still open to contest, and the trial should have proceeded.

The plaintiff has, however, attempted to take refuge under the provisions of Wagner's Statutes (273, § 4; 876, § 46). Under the first section, "the county court may, by order, appoint a commissioner to sell and dispose of any real estate belonging to their county; and the deed of such commissioner * * * * * shall be sufficient to convey to the purchaser all the right, title, interest and estate which the county may then have in or to the premises so conveyed." By the terms of the second section, above referred to, swamp lands are placed on the same footing as other lands owned by the county, and it is argued, that, although the county court revoked the order made to the sheriff, yet, if after such revocation, it ordered the land to be sold and conveyed the same through its officer to plaintiff, the title thereby passed.

This argument will not bear a moment's criticism, for the answer makes no such allegation. It only alleges, that by mistake, either of the county court or of the commissioners, in preparing the deed, the land in dispute was by mistake inserted.

And the further point, that plaintiff makes in order to uphold the judgment of the court below, that defendant should have moved for a new trial is equally untenable. Advantage of the erroneous ruling made by the trial court might have been taken by moving for a new trial; but this was not the only mode for redress open to the defendant. The error committed being one patent of record, he had a right to have the action of the lower court reviewed on the motion in arrest.

The judgment is reversed and the cause remanded. Judge Vories absent; the other judges concur.

The State of Missouri, Respondent, *vs.* John C. Heed, *et al.*, Appellants.

1. *Scire facias—Recognizance—Record—Errors—Demurrer.*—A *scire facias* on a recognizance is merely a continuation of an existing proceeding to enforce the collection of a debt confessed, and if enough appears from the record and files of the court to entitle the State to execution, any errors or omissions in the writ will be disregarded on demurrer to the writ.
2. *Scire facias—Demurrer—Recognizance, crime not stated in—Record.*—A demurrer to a *scire facias*, that the recognizance did not state the crime of which the defendant was convicted, is bad, where the title of the original cause is therein stated, and the record of the cause shows the crime, and the recognizance is conditioned according to law, and was properly entered into.
3. *Recognizance to abide appeal—Remanding cause—Circuit court, order of, on defendant to appear for new trial.*—When a defendant enters into a recognizance for an appeal, upon reversal of the cause in the higher court it is his duty to appear for a new trial without further order on him from the trial court to that effect.

Appeal from Mercer Circuit Court.

H. J. Alley, for Appellants.

I. Neither the *scire facias* nor record sets up that the defendant failed to appear in said Supreme Court, or that said Supreme Court ordered him, or made an order, that he appear in the circuit court, or that the Supreme Court entered any forfeiture of the recognizance or certified the same to the circuit court. (Wagn. Stat., 1113, § 8; Id., 1115, §§ 18, 19, 23.)

II. The recognizance does not set up any criminal charge. (1 Arch. Cr. L., 195; State vs. Gibbon, 23 La. Ann., 698; Thomas vs. People, 13 Ill., 696; Nicholson vs. State, 2 Ga., 363.)

The record shows, that the recognizance was taken by the judge, or in the presence of the judge, in vacation and in another county, and does not show that defendant was before him in any manner required by law, or that the judge in vacation, in any manner whatever, acquired jurisdiction or authority to take said recognizance.

J. A. Hockaday, Att'y Gen'l, for Respondent.

The transcript of the record contains no copy of the *scire facias* issued in the court below; there is, therefore, no means by which this court can judge of its sufficiency. (Sudarth vs. Cox, 33 Mo., 149.)

Hough, Judge, delivered the opinion of the court.

The defendant, John C. Heed, having been convicted in the Mercer circuit court of the crime of perjury, appealed to this court, and entered into a recognizance before the circuit judge in the sum of one thousand dollars, conditioned as provided in the 8th section of the 8th article of the statute in relation to criminal cases. The judgment of the circuit court was reversed by this court, and the cause was remanded to be re-tried. The defendant Heed failed to appear in the court below when his case was called for trial, and a judgment of forfeiture was taken and entered upon his recognizance, and a *scire facias* was issued against the defendant on this forfeiture. The sureties appeared and demurred to the *scire facias* on several grounds. The demurrer was overruled, final judgment was entered thereon against defendants, and they have appealed to this court.

The *scire facias* is not in the record, but this is not material, as the demurrer to the writ goes also to the record. This writ is not a declaration, nor is it in the nature of a suit on the recognizance, but it is a mere continuation of an existing proceeding to enforce the collection of the debt confessed. If enough appears in the record and files of the court to entitle the State to execution, any errors or omissions in the writ will be disregarded on demurrer to the writ. (State vs. Randolph, 22 Mo., 474; State vs. Rogers, 36 Mo., 138; State vs. Potts, 60 Mo., 368.)

The demurrer raises but two objections which are worthy of notice: First, that the recognizance failed to specify the offense with which the defendant was charged, or any offense on account of which the court or judge was authorized to take the recognizance; and, second, that it does not appear

that any order was ever made by this court, requiring the defendant, after the reversal of the judgment, to appear in the circuit court for trial.

It is true that the crime, of which the defendant was convicted, was not specified in the recognizance, but the title of the cause from which the appeal was taken, and in which John C. Heed was named as defendant, was stated, and the record shows what the offense, charged in that cause, was. It is admitted in the record that the recognizance was given to abide the judgment of this court in that particular case, and that it was entered into before the circuit judge, and being conditioned according to law, it is certainly sufficient to bind the defendants.

The second objection is based on an apparent, rather than a real, defect in the proceedings.

When the judgment of the circuit court was reversed by this court, no direct or specific order was made, that the defendant should appear in the circuit court, and undergo a new trial, but this was necessarily implied in the order remanding the cause to that court for another trial. The judgment of this court was, that the defendant had been illegally convicted and should be tried again, and this was as binding upon the defendant as upon the State. The defendant was not thereby discharged. The order remanding the cause was one, which, in its very nature, required the parties to that cause to appear before the circuit court for further proceedings in accordance with the opinion of this court. It was the duty of the defendant, in rendering obedience to that order according to the conditions of his bond, to appear at the circuit court and submit himself to trial.

The record recites that he failed so to appear, and such failure was a breach of his recognizance, for which the defendants are liable.

The judgment will be affirmed. All the judges concur, except Judge Vories, who is absent.

SEBRON J. HOLMAN, Respondent, *vs.* THE CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, Appellant.

1. *Evidence—Railroads—Killing stock at crossing of public highways—Statute, construction of.*—When it is alleged that stock was killed by a train of cars, where the railroad crossed a public highway, because the bell was not rung or the whistle sounded (Wagn. Stat., 310, § 38), all the facts and circumstances must be proved, so that the jury can determine whether the killing was due to such neglect. (Stoneman vs. Atl. & Pac. R. R., 58 Mo., 503.)

2. *Practice, civil—Trials—Railroads—Injury to stock—Instructions by court—Evidence, lack of.*—Where the only proof in a suit against a railroad for killing stock at a public crossing is the death of the animal, and the failure of the railroad to ring the bell or sound the whistle, it is the duty of the court to declare as a matter of law that the plaintiff cannot recover. (Owens vs. Hann. & St. Jo. R. R., 58 Mo., 386; Howenstein vs. Pac. R. R., 55 Mo., 33, considered.)

Appeal from Clinton Circuit Court.

Shanklin, Low & McDougal, for Appellant.

I. The fact, that defendant's employee failed to ring the bell or sound the whistle on the train that killed plaintiff's cow, is not of itself sufficient to make the company liable. (Wagn. Stat., 310, § 38; Stoneman vs. A. & P. R. R. Co., 58 Mo., 503; Karle vs. Kansas City, St. Jo. & C. B. R. R., 55 Mo., 483; Ills. Cent. R. R. Co. vs. Phelps, 29 Ill., 447; C., B. & Q. R. R. Co., vs. McKean, 40 Ill., 218; Rockford, etc., R. R. Co. vs. Linn, 67 Ill., 109; Ch. & A. R. R. Co. vs. Henderson, 66 Ill., 494.)

Wm. Henry, for Respondent.

I. When negligence is clearly shown, and an injury has actually occurred, it is reasonable *prima facie* to refer the injury to such acts or negligence without requiring further proof. (Johnson vs. Hudson R. R. R. Co., 20 N. Y., 65; Gt. West. R. R. Co. vs. Geddis, 33 Ill., 304; Howenstein vs. Pac. R. R. Co., 55 Mo., 33; Walther vs. Pac. R. R. Co., 55 Mo., 271; Stoneman vs. Atl. & Pac. R. R. Co., 58 Mo., 503; Owens vs. Hann. & St. Jo. R. R. Co., 58 Mo., 386.)

HOUGH, Judge, delivered the opinion of the court.

This was an action to recover damages for the killing of a cow, belonging to the plaintiff, by a train on defendant's railroad in a street of the town of Cameron.

The evidence given at the trial is stated in the bill of exceptions in the following language: "The plaintiff, to maintain the issues on his part, introduced evidence tending to show, that the bell was not rung, nor the whistle sounded on the train mentioned in his statement, as it approached and ran over the cow in controversy; that the cow was killed on defendant's railroad on a public traveled street of the town of Cameron, in Shoal township, by a train on said railroad, and that said cow was worth thirty-five dollars. The defendant introduced one Kiley, who testified that he was the conductor on said train, and that the bell was rung and the whistle sounded. This was all the evidence offered."

It will not be necessary to notice the instructions given and refused. There was a verdict and judgment for the plaintiff, and the defendant has brought the case here by appeal.

The statute in relation to railroad corporations, which requires the bell on the locomotive to be rung, or the steam whistle to be sounded, before reaching and while crossing any traveled public road or street, provides a penalty for the neglect of such requirement, and further declares that the corporation shall be liable for all damages which shall be sustained by any person by reason of such neglect. Conceding that the servants of the defendant neglected to ring the bell or sound the whistle, the question is, whether there is any evidence tending to show that the cow was killed by reason of such neglect.

In the case of Stoneman vs. Atl. & Pac. R. R. Co., 58 Mo., 503, it was said, on the point in judgment, that "the court had no right to declare as a matter of law, that the jury had nothing to find but the killing of the animal at the crossing of a public highway, and the failure of the company to have the bell rung or the whistle sounded. There may have been

no connection, whatever, between the negligent omission and the damage; and the very terms of the statute, under which the suit is brought, clearly indicate that the damage must be the result of the negligence."

The foregoing extract clearly asserts, that there is no necessary connection between the failure to ring the bell or sound the whistle, and the killing; that both may concur in point of time, and the latter not be the result of the former. How then must the connection be shown? By evidence, undoubtedly. Who must produce such evidence? The party who asserts that such connection exists. The damage must be shown to be the result of the negligence; that is, the negligence must first be shown, and this fact must be supplemented by testimony tending to show that the negligence occasioned the damage. This testimony should consist of all the facts and circumstances attending the killing, so that the jury could fairly and rationally conclude whether it resulted from the failure to ring the bell or sound the whistle, or from other causes. In the case at bar no such testimony was offered; but two facts were shown to fix the defendant's liability, the failure to give the required signal at the crossing, and the killing. No fact was shown tending to connect the two. If the plaintiff can recover on the evidence embodied in the bill of exceptions, it must be, because it is only necessary for the jury to find the killing of the animal on the highway, and the failure to ring the bell or sound the whistle, for there is no testimony from which they can find more. But this, we have seen, is not sufficient. Upon the case made, it was the duty of the court to declare as a matter of law that the plaintiff was not entitled to recover.

This conclusion has been reached after a careful consideration of the case of Owens vs. Hann. & St. Jo. R. R. (58 Mo., 386), and Howenstein vs. Pac. R. R. (55 Mo., 33.)

The judgment must be reversed and the cause remanded. All the judges concur, except Judge Vories, who is absent.

MARY LEE, Plaintiff in Error, *vs.* THE DETROIT BRIDGE AND IRON WORKS, Defendant in Error.

1. *Master and servant—Injury—Fellow-laborer, incompetency of—When master liable.*—A master is not liable for damages to his servant, occasioned by negligence or unskilfulness of a fellow-servant, unless there be evidence tending to show that the master, or his agent, in selecting the servant had reason to know of such incompetency, or failed to make such inquiries as prudence required when he was employed, or retained him after his incompetency or unfitness had become obvious.
2. *Master and servant—Injury—Fellow-servant, incompetency of—Negligence, one act of—Evidence.*—One single act of negligence by a servant does not by itself have any tendency to establish general incompetency.

Error to Buchanan Circuit Court.

Doniphan & Reed, for Plaintiff in Error.

W. H. Sherman, for Defendant in Error.

I. A master is not liable to his servants for injuries to them produced by the negligence of a fellow servant, unless the master has been negligent in the appointment of such negligent agent, or in retaining such servant after notice of his incompetency. (Whart. Negl., § 224, and cases cited; Shearm. & Redf. Negl., § 86, and cases cited.)

II. The *onus* of proof of such negligence, or want of care, is on the plaintiff. (McDermott vs. Pac. R. R. Co., 30 Mo., 115; Rohback vs. Pac. R. R. Co., 43 Mo., 187; Harper vs. Ind. & St. L. R. R. Co., 44 Mo., 488; Gibson vs. Pac. R. R. Co., 46 Mo., 163; Moss vs. Pac. R. R. Co., 49 Mo., 168; 32 Md., 410; 37 Eng. C. L., 281; Shearm. & Redf. Negl., § 99, and cases cited; Whart. Negl., §§ 234, 243, and note.)

III. Single exceptional acts of negligence do not prove an employee to be incompetent. (49 Mo., 167; 62 Barb., 623; 38 Ind., 294; 38 Penn. St., 104; 7 Gray, 92; 6 Cush., 396; Whart. Negl., § 238, note 2.)

NAPTON, Judge, delivered the opinion of the court.

This action was brought, under the 3rd section of our law concerning damages, to recover $5,000 for the death of plain-

tiff's husband, alleged to have been occasioned by the negligence of the defendant.

The petition alleges, that Lee was a day laborer in the employment of defendant; that in adjusting a lock frame, which supported the shaft and lock in the caisson of the pivot pier of the bridge across the river at St. Joseph, Lee was ordered by the assistant superintendent to assist; that the frame was carelessly and negligently swung upon a rolling dolly, and not properly secured; that the duty of adjusting and moving this frame, and working upon it, was such as required skilled and experienced men, for which greater compensation was paid than to day laborers; that it was the duty of the defendant to employ on such work competent and experienced workmen, and to provide secure machinery and appliances, and have it worked in a careful manner; but that defendant failed to employ such skilful and competent men, and carelessly and negligently permitted the use of defective and improper appliances, and entrusted them to the control of incompetent persons, and, in consequence of such negligence, plaintiff's husband was precipitated into the river and drowned.

The answer denies all the allegations of the petition, and sets up contributory negligence, which the replication denies.

After the evidence was given for plaintiff, the court instructed the jury that the plaintiff could not recover, and thereupon plaintiff took a non-suit with leave, etc., and subsequently moved to set it aside, which motion being overruled, the case is brought here by appeal.

It appears from the testimony, that the accident occurred in putting in a frame into the caisson. This frame had been built on the bank of the river, and moved on a dolly to the point where it was suspended, directly over the caisson, by a block and tackle to let it down to its proper place in the caisson. The ropes around the frame embraced the plank, on which it rested, and the dolly, on which it had been moved, and were so unskilfully adjusted, that, when the foreman ordered the men to jump on it, to press it down, it inclined to

one side, and five of the men on it were precipitated into the water, and one of them, Lee, was drowned.

The machinery was all right; there was no defect in the ropes or pulley, or any other appliances used; but the dolly was improperly left under the plank on which the frame rested. The work was under the immediate care of one Shepley, who with another foreman, named Taylor, was putting on the frame. Both of these foremen were under the supervision of Patton, assistant superintendent, and Robinson, general superintendent. Patton and Robinson were both present when the accident occurred. It does not appear, however, that Robinson interfered in any way, except to call attention to Lee when he fell through.

One witness states that Patton called on the men to jump on the frame, and Shepley first jumped on and called on others to do so, and Shepley and four others fell into the water from the frame.

There is one witness who gives it as his opinion, that Shepley was incompetent for the place of foreman of bridge carpenters; but there was no proof showing, or tending to show, that defendant was guilty of negligence in his employment, or retained him in their employment after being apprised of his incompetency.

There is no evidence at all of any insufficiency of the machinery or of any of the appliances used to put this frame into the caisson. All the witnesses think the accident occurred, not from any defect of machinery, but from the carelessness or unskilfulness of Shepley in fastening the rope around the dolly, thereby rendering the frame liable to slip to one side. It does not appear that Patton, who was assistant superintendent, was aware of this negligence on the part of Shepley, when he ordered the men to jump on the frame, if he did so order them.

The general rule, that a master or employer is not liable for an injury to a servant or employee, occasioned by the negligence or unskilfulness of a fellow-servant, seems applicable to the case presented by the pleadings and evidence. There

is no question, that a master is responsible for negligence or want of care in appointing an incompetent servant, when through the negligence of such servant an injury to a fellow-servant occurs; but there must be some evidence tending to show, that the master or his agent, in selecting an employee, had reason to know of such incompetency, or failed to make such inquiries as prudence required, when he was employed, or retained him after his incompetency or unfitness had become obvious. A single act of negligence assuredly does not establish general incompetency, or by itself have any tendency to do so. It would seem, from the fact that Shepley had already constructed four other caissons for piers in the bridge, without any accident, that the superintendent had reason to believe him perfectly competent to build the fifth.

A careful examination of the evidence has lead to the conclusion, that there was no evidence on either of the two points of fact, which would take the case out of the ordinary rule, none, whatever, in regard to defective machinery, and not enough to take the case to a jury in relation to the employment of incompetent workmen. If a single act of negligence is to be regarded as tending by itself to show incompetency, and furnish any ground for conjecture that such incompetency is known to the company or its agents, then, it must follow, that all cases of damage by negligence of a fellow-servant may be allowed to be traced to the negligent appointment of incompetent subordinates. Practically, such inferences would produce injustice, as the most careful and best qualified workmen in any branch of mechanism are liable to mistakes.

In the present case the unfortunate disaster seems to have been occasioned by some defective arrangement of the tackle, which allowed the platform, on which the weight of 9 or 10 men was unequally distributed, to sway to one side, and perhaps the retention of the circular dolly, or roller, contributed to render unsafe the experiment of getting down the frame into its place by the weight of the men.

It does not appear that the superintendent, Robinson, took any part, whatever, in this work, or that his assistant, Patton,

did any more than second the order of Shepley for the men to jump; there being no apparent danger to him or any of the others engaged, as is rendered clear from the fact, that the foreman Shepley was the first to get on the platform. The whole work was entrusted to Shepley and Taylor, who were foremen of the bridge carpenters, and the accident was evidently the result of the carelessness of Shepley in adjusting the rope, or retaining the dolly under the plank.

The judgment must be affirmed. The other judges concur, except Judges Wagner and Vories, who are absent.

THE HANNIBAL AND ST. JOSEPH RAILROAD COMPANY, Appellant, *vs.* OLE KNUDSON, Respondent.

1. *Practice, civil—Pleadings—Contract sued on not filed—How objection to be made—Statute, construction of.*—Where a pleading is founded on an instrument in writing alleged to have been executed by the other party, it must be filed with the petition, though no statement in the petition in regard to the filing is required (Wagn. Stat. 1022, § 51), unless it is alleged to be lost or destroyed. If it is not filed, and no reason is given for not filing it, a demurrer will not lie; the remedy is by motion to dismiss, or by motion to require th party to file it. If any other reasons than those mentioned in the statute, are given for not filing it, it is ground for demurrer.

Appeal from Linn Circuit Court.

James Carr, with H. B. Leach, for Appellant.

I. The appellant, being a corporation, was entitled to file a copy of the contract certified by the president, and authenticated by the seal of said corporation, and the copy should have been received by the court with like effect as the original. (Wagn. Stat., 592, § 18.)

II. The non-filing of the contract was not a ground of demurrer. (Wagn. Stat., 1014, § 6.)

III. It would be exceedingly inconvenient and impracticable for the appellant to be required to file its duplicate of the contract sued on, as each instalment fell due under it.

A. W. Mullins, for Respondent.

I. The original contract should have been filed with the petition, or its absence accounted for. (Wagn. Stat., 1022, § 51.) And the failure to file the original contract was a ground of demurrer. (Dyer vs. Murdock, 38 Mo., 224; Rothwell vs. Morgan, 37 Mo., 107.)

Hough, Judge, delivered the opinion of the court.

This was an action founded upon a contract, alleged to have been executed by the defendant, which was not filed with the petition; nor was any reason given for failing to file it.

The defendant demurred to the petition on the ground, that it did not state facts sufficient to constitute a cause of action, and that said contract was not filed with the petition, nor alleged therein to be filed, nor was its absence in any way accounted for. The demurrer was sustained; final judgment thereon was rendered for the defendant, and plaintiff has appealed to this court.

The present practice act provides, that when the petition, or other pleading, is founded upon any instrument of writing charged to have been executed by the other party, such instrument shall, unless therein alleged to be lost or destroyed, be filed with such petition or other pleading. No statement is required in the petition or other pleading, that it has been so filed, and a demurrer will not therefore lie for the want of such statement. The revised statutes of 1835 and 1845, regulating practice at law, required in such cases, that profert should be made and oyer given. No such requirement now exists, and a simple filing has been substituted therefor. In analogy to the old form of pleading, it is customary, under the present statute, to use the words "herewith filed," but the statute does not require the use of those or any words of like import.

If the instrument sued on is not filed, and a reason is given therefor in the petition, it must be the statutory reason, that

it has been lost or destroyed, and the statement of any other excuse will furnish ground for demurrer. (Burdsal vs. Davies, 58 Mo., 138; Dyer vs. Murdock, 38 Mo., 224.)

But where the instrument has not been filed, and no reason is given in the petition why it has not been filed, a demurrer will not lie, if the petition states a good cause of action; for a demurrer lies only for defects appearing on the face of the petition. The only ground of complaint in such case is the failure to file the instrument, and the remedy is by motion to dismiss for that reason, or to require the party to comply with the statute and file the instrument. (Rothwell vs. Morgan, 37 Mo., 107.)

The judgment will be reversed and the cause remanded. The other judges concur, except Judge Vories, who is absent.

WILLIAM CLAMPITT, Respondent, *vs.* WILLIAM KELLEY, Appellant.

1. *Unlawful detainer—Equitable title, voluntary sale of—Sheriff's deed—Relation—Tenant, attornment by.*—A., having an equitable title to land, sold the land to B., and subsequently, as B.'s agent, leased the land to C. Afterwards the land was attached as A.'s and was, on execution in that suit, sold by the sheriff. The purchaser demanded that C. attorn to him, but C. surrendered the property to D. as B.'s agent, who let the land to the defendant. *Held*, on suit by the purchaser against the tenant for unlawful detainer, that the doctrine of relation did not apply, and that neither C. nor the defendant could properly attorn to the plaintiff. (Wagn. Stat., 880, § 15.)*

Appeal from Caldwell Circuit Court.

J. A. Holliday, with Willard P. Hall, Jr., for Appellant.

Shanklin, Low & McDougal, for Respondent.

*The head note explains some points concerning the relations of the parties, which the opinion leaves ambiguous, the information being derived from the statements of the counsel.—REP.

SHERWOOD, Judge, delivered the opinion of the court.

Action for unlawful detainer. Henry F. Heazlite contracted with the Hann. & St. Jo. R. R. Co. for the purchase of the premises in controversy in 1868. After making the first payment, he, on the 10th of January, 1872, sold and transferred his interest in the land to Mrs. Susan Heazlite, receiving payment in full for the assignment of the written contract with the railroad company. In March, 1873, the land was attached as the property of Henry F. Heazlite, and the attachment proceedings culminated in a judgment in the same year, plaintiff, the purchaser at execution sale, receiving a deed October 30, 1873. After the sale by Henry F. to Susan Heazlite, the former, as agent of the latter, rented the property to Bowers, and then, after the expiration of Bowers' lease, on the 1st of March, 1873, Henry F., through Eli Heazlite, rented the premises to Jacob Harpester, until the 1st of March, 1874. In thus renting to Harpester, Henry F. acted only as the agent of the person to whom he had sold, and this renting to Harpester was made prior to the levy of the writ of attachment, and long subsequent to the sale to Mrs. Susan Heazlite; so that it clearly appears from the evidence, that, at the time of the sale made by the sheriff, Henry F. Heazlite had neither interest in, nor possession of, the premises sued for.

Under these circumstances the doctrine of relation can obviously have no bearing on the case before us, as Henry F. Heazlite, whose title the sheriff's deed purports to convey to the plaintiff, had parted with his equitable interest, and had relinquished the possession of the land in dispute, long before the levy of the writ of attachment above referred to. This being the case, although a tenant in certain instances, pointed out in the statute, is authorized to attorn to the purchaser of his landlord's title, neither Harpester nor defendant could have lawfully attorned to the plaintiff. (Wagn. Stat., 880, § 15.)

For these reasons the latter was not entitled to recover in this action; the instruction asked by defendant in the nature of a demurrer to the evidence should have been given; and the judgment is reversed. Judges Wagner and Vories absent; the other judges concur.

JOHN B. WELLS, Appellant, *vs.* CHARLES A. PERRY, Respondent.

1. *Equity—Stale demands—Excuses.*—Equity will not countenance the prosecution of stale demands, unless there be some attendant circumstances which will excuse the seeming laches, and palliate the apparent delay.
2. *Limitations, statute of—Trust, breach of—Assignment of goods—Creditor.*—The statute of limitations is a good defense to a suit brought against a trustee to whom goods were assigned to be sold for the payment of debts, when there was a breach of the trust about the time of the assignment with the knowledge of the creditor, twelve years before suit brought.

Appeal from Buchanan Circuit Court.

B. Loan and B. R. Vineyard, with James J. Hitt, for Appellant.

This was a continuing trust, and no lapse of time will bar the action. (27 Mo., 591; 39 Mo., 292; Johns. Ch. R., 190, 384, and cases cited.)

Allen H. Vories, for Respondent.

I. The statute of limitations bars the action. (Johnson vs. Smith, 27 Mo., 591; Keeton vs. Keeton, 20 Mo., 530; Benton vs. Lindell, 10 Mo., 557; Smith vs. Ricords, 52 Mo., 581; Ricords vs. Watkins, 56 Mo., 553.)

II. The long time and acquiescence of plaintiff and his failure to assert his rights, if any he had; his conduct, and acts and silence for eleven years, are strong presumptions against him, and a court of equity will not relieve him. (Taylor v. Blair, 14 Mo., 437; Moreman vs. Talbott, 55 Mo. 397.)

SHERWOOD, Judge, delivered the opinion of the court.

Wells, the plaintiff, instituted this suit January 3, 1871, against Perry, the trustee in a deed of assignment made May 9, 1859.

The other defendants (with the exception of Paxton, the administrator of Merritt L. Young, deceased) were beneficiaries under the deed, who refused to join with the plaintiff in the prosecution of his suit, the object of which was to enforce the performance of duties, which, the petition alleges, were offered and accepted by the trustee by his signing and acknowledging the deed, taking charge of the property conveyed, and selling the same.

This deed, though mentioned in the petition as filed therewith, and stated in the bill of exceptions to have been read in evidence, has been omitted from the record. The same may be said of the deposition of C. P. Armstrong. It appears, however, from the petition, that, by the terms of the deed referred to, it was made the duty of the trustee, to whom Merritt L. Young had transferred a stock of goods at Atchison, Kansas, worth some $30,000, to sell the same at Salt Lake City, and out of the proceeds of the sale thus made to pay all advancements, the costs and charges of transporting the goods to the point last named, then to pay the plaintiff the amount due on two promissory notes for $1,000 each, dated April 20, 1859, and due one day thereafter, executed to plaintiff by Young, afterwards to pay certain other debts, and, if there were any residue, to pay the same to the grantor in the deed, etc. It is also alleged, that Perry took the property to its point of destination and realized from its sale about $30.000, an amount sufficient to pay all advancements, charges, etc., and the debt of plaintiff; that Young died in 1864 insolvent; that Perry, though often requested, failed and refused to pay plaintiff's claim. An accounting is asked, judgment for the amount due on the notes, and for general relief.

The answer of Perry pleaded the statutory bar of ten years; denied that he ever accepted the trust, took possession of or

sold the goods, and charged that the deed mentioned in the petition was a "sham affair," gotten up at the instigation of Wells himself for the purpose of hindering, delaying and defrauding certain creditors of Young, who resided in Platte county, and were suing out attachments and having them levied on these goods; that Young, with plaintiff's knowledge and consent, retained possession of the goods, took them to Salt Lake at his own expense, and sold them on his own individual account; and the answer further alleged that plaintiff sent one J. B. Evans to Salt Lake to collect his debt, and that Evans did so. A reply was filed.

The evidence in this cause abounds in contradictions; portions of the testimony give some support to the allegations of the petition, while other portions uphold the statements of the answer. But we are of opinion, after a very careful perusal of the evidence, that it greatly preponderates on the side of the defendant, Perry. It would indeed be difficult to carefully examine the evidence adduced, without arriving at the confident conclusion, that the assignment made by Young was, as alleged by the answer, "a sham affair," and that Wells was an active participant therein.

Perry's testimony, that he never took charge of the goods, was not to have any control of them, and that his acceptance of the trust was a mere formal matter, is fully supported by the testimony of Lawson, who drew the deed, that it was not contemplated that Perry ever would have such custody or control. And testimony also is not wanting strongly tending to establish that Evans, the brother-in-law of Wells, went out to Salt Lake in the double capacity of a clerk to Young and as the agent of Wells, for the protection of the latter's interests and the collection of his debt; and that the debt was in reality collected.

And if Evans was the agent of Wells in this regard, and failed to conform to the duties imposed by his agency, this certainly can form no just ground for complaint against Perry, who had no concern in the matter.

But if Evans acted only as the mere clerk of Young, and Wells permitted Young to depart with the goods in his own custody, and not under the supervision or control of the trustee, any complaint by Wells, on the score of that at which he himself actively connived, must be equally groundless; and, if, too, the deed of assignment and its acceptance were but thin disguises for baffling other creditors of Young, Wells would occupy but a very indifferent attitude, when invoking the aid of a court of equity for the enforcement of a trust, which never had anything more than an imaginary existence.

But granting, that the transaction was *bona fide*, granting that Wells, in securing his own claim, had no intent to do more than to make himself a preferred creditor, which he might lawfully do, so long as cherishing no design against the rights of others; still what excuse does he offer for his great delay in the assertion of his rights? None whatever. According to his own theory, this is not a case of continuing trust, for the trust was broken, if broken at all, about the time of its formation; and from that time to the institution of this suit nearly twelve years had elapsed. He says he never knew of an assignment having been made, until after the return of Evans from Salt Lake. But this occurred in October, 1859.

The plaintiff says further, that he did not sue Evans on the note on which he was the surety of Young, because he thought Perry had the proceeds of the sale of the goods and ought to pay it, and that he had been trying to collect the money from Perry for ten years.

It is a doctrine of universal recognition with courts of equity, that they will not countenance the prosecution of stale demands, unless there be some attendant circumstances which will excuse the seeming laches, and palliate the apparent delay.

There is nothing in this record having any tendency in this direction. So that, were we to lose sight of the statutory bar, which the defendant properly pleaded, the gross laches exhibited by the plaintiff, would of itself be equally

potent in precluding him from obtaining equitable relief. But leaving out of view the limitation of the statute, and the great negligence of the plaintiff, the action of the court below may well receive our sanction upon other considerations already adverted to.

We shall therefore affirm the decree, dismissing the plaintiff's petition. Judges Vories and Wagner absent; the other judges concur.

PRICE W. ATKINS, Respondent, *vs.* THOMAS E. HULSE, AND WARREN E. BROWN, Appellants.

1. *Conveyances—Title to one and money paid by another—Evidence necessary to set aside.*—Land was conveyed to A. in consideration of a negro, which had been the property of A., but was alleged to have been given by him to B. *Held*, that the evidence leaving the fact of the gift uncertain, the deed would not be set aside.

Appeal from Andrew Circuit Court.

John P. Altgeld, with J. B. Majors, for Appellants.

A. J. Harlan, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

This was an action of ejectment, brought by the plaintiff, as one of the heirs of Tevis C. Atkins, deceased, to recover a portion of certain lots in the town of Fillmore, Andrew county.

Both parties admit that the legal title was in Tevis C. Atkins, and both claim from him as the common source. Defendants claim, and set up in their answer, that the lots were purchased for, and with the money of, Elizabeth W. Dillon, sister of said Atkins, but that by mistake the deed was made to him. Mrs. Dillon was in possession, and afterwards, in 1865, sold the property to Hulse, one of the defendants, who subsequently conveyed a portion of it to Brown, the other defendant.

When the deed from Mrs. Dillon to Hulse was made, the prior conveyance to Atkins was on record. The case was tried by the court, and, after hearing the testimony, a judgment was rendered for the plaintiff.

The main point of inquiry is, whether the evidence sufficiently establishes the claim set forth in the answer, that the lots were paid for with the money of Mrs. Dillon, and that the deed of conveyance was made to her brother, Tevis C. Atkins, by mistake.

The purchase money was derived from the sale of a negro woman. It seems that Atkins owned this negro woman in Virginia, and came to Missouri with his sister, and they brought the woman along with them. There is nothing evidencing a direct and absolute gift of the woman to Mrs. Dillon by Atkins. He appears to have been anxious to assist her, and said that he had brought the woman for her. It is true, that she says in her testimony in one place, that her brother gave her the woman, but taking all the circumstances together, and the other evidence which is inconsistent with this declaration, and it does not bear out the idea that he ever divested himself of, or imparted to her, the legal title. He may have intended as a friendly act that she should have the benefit of the negro, but the evidence is altogether too weak to be construed into an absolute gift. Mrs. Dillon testifies, that, after her brother obtained the deed, he gave it to her, and remarked that it was not as he wanted it, and that he was going to Virginia, and after his return he would change it and have it made in her name. He died on his way to Virginia and never returned. But from other sources it is clearly shown, that he sold the negro and gave a bill of sale for her, and had the deed made out to him. The legal title was vested in him, and the weight of evidence is, that the consideration emanated from him. I think it could be hardly claimed, that Mrs. Dillon could have maintained the possession of the woman from him against his will. He may have intended to have given Mrs. Dillon the title to the lots, but he never lived to carry out his intention. Taking all the

facts together, they are surely insufficient to destroy the legal title and overcome a solemn deed.

There is no merit in the statute of limitations pleaded by the defendants. When this cause of action accrued, the plaintiff was a mere infant, and the action was brought in the time limited in the statute after the disability was removed.

Upon the whole record, we think there is no ground for reversal. Judgment affirmed. All the judges concur, except Judge Vories, who is absent.

GEORGE MIDDLETON, Respondent, *vs.* THE KANSAS CITY, ST. JOSEPH AND COUNCIL BLUFFS RAILROAD COMPANY, Appellant.

1. *Principal and agent—Agency, how proved—Knowledge of facts—Subsequent adoption.*—Where the principal has previous knowledge of all the material facts, an agency may be proved by subsequent ratification and adoption.
2. *Evidence—Judgments between other parties—Agency—Estoppel.*—In a suit by A. against B. for work done at the employment of B.'s agent, a judgment of B. against the agent is no evidence against A.

Appeal from Nodaway Circuit Court.

Mossman & Hale, for Appellant.

Johnston & Jackson, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

This case was originally brought before a justice of the peace, where the plaintiff obtained judgment, and the cause being removed to the circuit court, a trial was therein had, and the judgment was again for the plaintiff. The action was for the price of digging a well by the plaintiff and others for the defendant; and the question turned exclusively upon the fact, whether plaintiff was ever employed by the defendant to do the work. It appeared, that one Shoemaker let out

the contract for the digging of the well, and one of plaintiff's witnesses testified that Shoemaker was acting as defendant's agent.

On the other side defendant's employees swore, that the contract was with Shoemaker himself to dig the well, and that he was not an agent. It was abundantly proved, that defendant's agents examined the well, when it was about being completed, and suggested some alterations, which plaintiff made; they then put a pump in it, and it has been used at defendant's stock yards ever since.

Upon the question of agency for the plaintiff, the court instructed the jury, substantially, that, if they found that Shoemaker was acting as the agent of the company in making the contract, and was properly authorized to make the contract, or procure the well to be dug, or after having acted as agent, the company approved of his action and accepted the well, then the verdict should be for the plaintiff.

On the question of acceptance, the court told the jury, that it was a matter for them to determine from all the facts and circumstances, as shown by the evidence, and if they found that the agent of the company was present at the completion of the well, examined it, gave directions as to how it should be finished, and with a knowledge of its capacity and dimensions pronounced it sufficient, and put a pump in and used it, such facts would amount to an acceptance. But, although the agent might have examined and measured the well, and given some directions as to the manner of finishing it, yet if he did not agree to accept it, but reserved the right to test it, and put the pump in for that purpose only, then there was no acceptance.

For the defendant the court instructed the jury, that, if defendant by its agents employed Shoemaker to dig the well, and that Shoemaker, after being so employed, made a contract with the plaintiff to do the work, and that defendant never authorized Shoemaker to make the last named contract, or ratified the same after it was made, then the finding should be for the defendant. A further instruction was given, that,

if Shoemaker was authorized or employed to dig the well, and that by the terms of the agreement he was to furnish sufficient water in the well for the uses for which it was intended, or receive no compensation, and if it was found from the evidence, that plaintiff made a contract with Shoemaker to dig the well, then plaintiff cannot recover, unless he has performed the contract made with Shoemaker by defendant, and defendant has received the well, and promised to pay plaintiff therefor.

It is difficult to perceive any valid objections to the instructions. For the defendant, they presented the case in the most favorable attitude. The question of agency was one of fact for the jury, as was also the question of acceptance and ratification.

There was evidence tending to prove the issue made by the plaintiff, and there was a good deal of evidence tending to contradict it on the part of the defendant; but it was for the jury to believe which side of the testimony they thought was entitled to the most credit.

Defendant's last instruction required the plaintiff to fully carry out and comply with the contract made between Shoemaker and the defendant; and it was further required in other instructions, that to bind defendant by its acceptance, it must have had knowledge of all the facts. Where the principal has previous knowledge of all the material facts, an agency may be proved by subsequent ratification and adoption.

The case, we think, was submitted with such manifest fairness, that it is needless to make any argument in support of the rulings of the court. The defendant introduced a judgment of the justice of the peace in a suit between plaintiff and Shoemaker about this same controversy, in which the verdict was for the latter, and asked the court to declare, that this was conclusive against the plaintiff, which the court refused to do. The judgment was between different parties, and any action between plaintiff and Shoemaker individually

would not bar an action against the defendant, if Shoemaker was acting as its agent.

The judgment should be affirmed. All the judges concur, except Judge Vories, who is absent.

CATHERINE CARTER, Respondent, *vs.* J. A. ARBUTHNOT, *et al.*, Appellants.

1. *Practice, civil—Suits where to be brought—Statute, construction of.*—The second section of the practice act (Wagn. Stat., 1005,) applies where the suit is brought against the property of the person alone, or there are no other defendants residing in the same county. The third section is intended to meet the case where the action is for the possession or there is something affecting the title.
2. *Attachment—Suits by, where to be brought—Statute, construction of.*—In suits by attachment (Wagn. Stat., 185, § 21), if the defendants reside or have property in different counties, then separate writs may issue to every such county. Wherever a defendant resides or has property, the suit may be instituted. Either the one or the other gives jurisdiction. Jurisdiction being thus obtained, a separate writ may then issse to any co-defendant, who either resides in, or has any property in, another county.

Appeal from Chariton Court of Common Pleas.

Charles L. Dobson, for Appellants.

C. Hammond, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

Plaintiff brought her suit in the Chariton court of Common Pleas, by attachment, against Beemer, who was a resident of that county, and Arbuthnot, who was alleged to be a non-resident of the State. A writ issued to the sheriff of Chariton county, and was returned duly served upon Beemer, and a separate writ was issued to Linn county, where the land of Arbuthnot was seized.

Publication was regularly made as to Arbuthnot, and at the return term he appeared and filed his plea in abatement. The issues were found against him, and final judgment was

rendered, awarding a special execution against his land. The only point made in this court is, that by the proceedings the court acquired no jurisdiction over Arbuthnot's lands situated in Linn county. To sustain this position, we are referred to sections two and three of the third article of the practice act (Wagn. Stat., 1005), the former section declaring that suits commenced by attachment against the property or person shall be brought in the county in which such property may be found; and the latter providing that suits for the possession of real estate, or whereby the title thereto may be affected, shall be brought in the county within which such real estate, or some part thereof, is situated.

By the 21st section of the attachment act, it is provided, that where there are several defendants, who reside or have property in different counties, and where a single defendant, in any such action, has property or effects in different counties, separate writs may issue to every such county. (Wagn. Stat., 185.) There is nothing inconsistent in the two provisions of the statute as contained in the practice act and the attachment law, but they are both harmonious and effective when applied to the cases contemplated by the statute. The second section of the practice act applies where the suit is brought against the property of the person alone, or there are no other defendants residing in the same county, and the third section is intended to meet the case where the action is for the possession, or there is something affecting the title. But the attachment law confers jurisdiction upon a different principle. If the defendants reside or have property in different counties, then separate writs may issue to every such county. Wherever a defendant resides or has property the suit may be instituted. Either the one or the other gives the jurisdiction. Jurisdiction being thus obtained, a separate writ may then issue to any co-defendant who either resides in, or has any property in, another county.

As Beemer resides in Chariton county, the suit was properly brought there, and the writ was then rightfully issued against Arbuthnot's property in Linn county. Wherefore

the judgment should be affirmed. The other judges concur, except Judge Vories, who is absent.

JOHN J. MOORE, Respondent, *vs.* THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, Appellant.

1. Holman vs. C., R. I. & P. R. R., *ante*, p. 562.

Appeal from Grundy Circuit Court.

Shanklin, Low & McDougal, for Appellant.

I. There was no evidence to show any connection between the negligent omission and the damages sustained by plaintiff. (Wagn. Stat., 310, § 58; Quincy, Alton & St. L. R. R. vs. Wellhorner, 2 Cent. L. J., 622; Stoneman vs. A. & P. R. R. Co., 58 Mo., 503; Karle v. K. C., St. J. & C. B. R. R. Co., 55 Mo., 483; Ills. Cent. R. R. Co. v. Phelps, 29 Ills., 447; C., B. & Q. R. R. Co. v. McKean, 40 Ills., 218; Chic. & Al. R. R. Co. v. Henderson, 66 Ills., 494; Rockford, &c. R. R. Co. v. Linn, 67 Ills., 109.)

Herrick & Peery, for Respondent, cited Howenstein v. P. R. R. Co., 55 Mo., 33; Owens v. Hann. & St. Jo. R. R. Co., 58 Mo., 386; Stoneman v. Atl. & Pac. R. R. Co., 58 Mo., 503.

HOUGH, Judge, delivered the opinion of the court.

This was an action to recover damages for the killing of the plaintiff's mule by defendant's train at a public crossing on the defendant's railroad.

The evidence given at the trial is stated in the bill of exceptions in the following language: "The plaintiff to maintain the issues on his part introduced evidence tending to prove that he was the owner of the mule described in the petition; that it was of the value of ninety-five dollars, and that it was killed by a train on defendant's railroad at a public crossing in Grundy county, on or about the day specified

in the petition, and that defendant's employees failed and neglected to ring the bell or sound the whistle on said train while approaching said crossing; that defendant was operating the Chicago and Southwestern Railroad at the time. This was all the evidence offered."

There was a verdict and a judgment for the plaintiff, from which the defendant has appealed to this court.

The instructions given and refused need not be noticed. There was no testimony to support the verdict. This case differs in no material particular from the case of Holman vs. C., R. I. & P. R. R., *ante p.* 562, and the opinion in that case is applicable to, and decisive of, this.

For the reasons there given, the judgment in this case must be reversed and the cause remanded.

All the judges concur, except Judge Vories, who is absent.

THE KANSAS CITY, ST. JOSEPH & COUNCIL BLUFFS R. R. Co., Appellant, *vs.* CAMPBELL, NELSON & Co., *et al.*, Respondents.

1. *Practice, civil—Jurisdiction—Railroads—Appropriation of property—Record, what it must show.*—When superior courts are engaged in the exercise of special and limited statutory powers, their records are subject to the same rules as those of courts of special and limited jurisdiction, and in proceedings to appropriate private property for the use of a railroad, the record must show that the parties to the suit could not agree upon the compensation to be paid. (Wagn. Stat., 826, § 1.)
2. *Summary proceedings—Property, divestiture of—Record, what must show.*—Wherever it is attempted by summary proceedings to divest the owner of his property, the record must affirmatively show, that the conditions precedent to the exercise of such extraordinary powers have been fully complied with.
3. *Practice, civil—Jurisdiction—Question, when to be raised.*—The question as to the jurisdiction of the court may be raised at any time and by any party.
4. *Process—Summons, service of—Acknowledgment of—Adults—Infants—Statute, construction of.*—A summons must be served on a minor precisely as on an adult. (Wagn. Stat., 1007, § 7.) An acknowledgment in writing on the writ of the service of summons (Wagn. Stat., 1008, § 9) can only be made by adults or those capable of acting for themselves. A minor cannot do it, nor

can his guardian for him. The statute relative to the appropriation of lands (Wagn. Stat., 326-7, § 1), requiring guardians to be made parties defendant, does not alter the rule as to the service of process.

5. *Railroads—Lands, condemnation of—Commissioners, report of, when set aside.* —Ordinarily, where opinions as to the value of the land might well be variant, the reports of commissioners, appointed to assess the land condemned for a railroad, will not be closely scrutinized; but the court will interfere where the damages assessed are flagrantly excessive; where there are manifest indications of an entire lack of appreciation of the duties and responsibilities of their position, and an utter obliviousness of the rudimentary principles of fairness and impartiality.

Appeal from Clay Circuit Court.

B. F. Stringfellow, for Appellant.

I. Nowhere on the record does it appear that the parties could not agree on the compensation to be made for the land taken. (Cunningham vs. Pac. R. R., 61 Mo., 33.) This being a question of jurisdiction, it can be raised even here for the first time.

II. An infant cannot waive service of process by himself or guardian.

III. The apportionment is so excessive as to call for the censure of this court.

J. W. Jenkins, with J. E. Merryman, for Respondents.

I. The facts are found by the commissioners, and like the verdict of a jury, when affirmed by the court sitting in the cause, will not be reviewed by this court, unless the court is satisfied that they erred in the premises on which they made their report. (St. L. & St. Jo. R. R. Co. vs. Richardson, 45 Mo., 466; 17 Mo., 376; 43 Barb. [N. Y.], 169; 24 Mo., 552; 2 How., 25; 6 How. Pr., 467; Abb. Dig. [Law of Corp.], 188.)

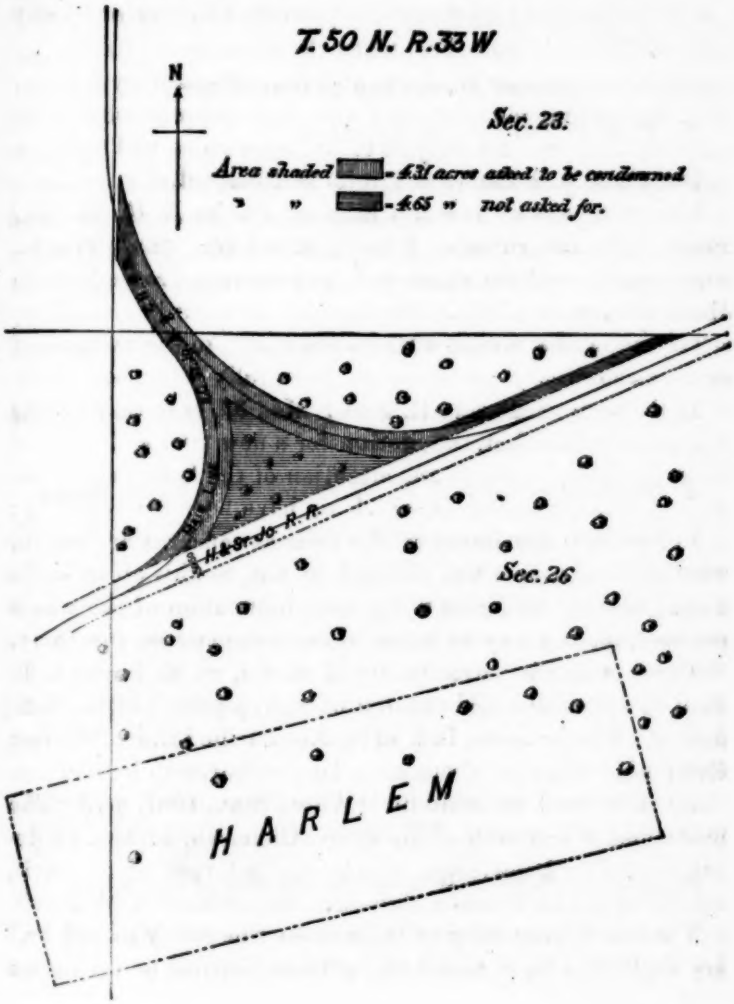
II. The court can only review the errors mentioned in the motion for a new trial. (Brady vs. Connelly, 52 Mo., 19.)

Sherwood, Judge, delivered the opinion of the court.

The proceeding, originally instituted by the Missouri Valley Railroad Co., of which the present plaintiff is the succes-

sor, had for its object the appropriation of a certain strip of land, to make what is known as a "Y," and to connect the road of the petitioner with the bridge at Kansas City, and the road then leading to the bridge, on the north side of the Missouri river.

The subjoined plat more fully illustrates my meaning.



We may remark at the outset, that there is a fatal defect observable in the record before us. It is this, that record does not show that the parties to this suit "cannot agree upon the proper compensation to be paid" for the land sought to be condemned. (Wagn. Stat., 326, § 1.)

This is a jurisdictional fact, and without it is apparent on the record, the court whose aid is sought, whether possessing special or general jurisdiction, is powerless to take any valid step in the premises. For, when the superior courts are engaged in the exercise of special and limited statutory powers, as in the present instance, they and their records occupy the same footing, and are subject to the same rules and tests, as courts whose jurisdiction is special and limited.

This point was so ruled in Ellis vs. Pacific R. R. (51 Mo., 200.) And the rulings of this court have been uniform, wherever it has been attempted by summary proceedings to divest the owner of his property, that the record must affirmatively show that the conditions precedent to the exercise of such extraordinary powers have been fully complied with. (Cunningham vs. Pacific R. R., 61 Mo., 33, and cases cited.)

As a matter of fact, the motion for a new trial and the one in arrest, both urged on the attention of the lower court the jurisdictional question on which we have been commenting; but this was quite immaterial, so far as concerns our action, whether this course was pursued or not, as this objection is a fundamental one, goes to the very foundation of the whole proceeding, and may be raised at any time and by any party.

There is another error patent of record, which is also sufficient to accomplish the reversal of the judgment of condemnation. I refer to the lack of service on the infant, William Campbell. Service of summons on a minor is to be had precisely as it must on an adult. (Wagn. Stat., 1007, § 7.) The provisions of section 9 of the same article, which permit a defendant to "acknowledge, in writing, indorsed on the writ, signed by his own proper signature, the service of such writ, and waive the necessity of the service thereof by an officer," are applicable only to adults, or those capable of acting for

themselves. For this reason it was incompetent, either for the infant to acknowledge service for himself, or for his guardian to make such acknowledgment for him. Nor is there any change effected in the ordinary manner of service of process on an infant in consequence of the statute in relation to appropriation of lands, providing, that where "the proceedings seek to affect the lands of persons under guardianship, the guardians must be made parties defendant." The only object of the provision was, doubtless, to obviate the necessity of appointing a guardian *ad litem*, the legislature probably regarding the interests of the minor safer in the hands of the general guardian, conversant as such person must be with the rights and interests of the infant, than in the hands of one appointed only for the occasion.

There is yet another error in this record, which should not escape severe animadversion. I speak of the damages assessed for the condemnation of the right of way. The damages thus assessed were $10,666. Reference has been made by defendant's counsel to the case of St. L. & St. Jo. R. R. Co. vs. Richardson (45 Mo., 466), where it is said with respect to the conduct of commissioners, "that unless the court is clearly satisfied that they have erred in the principles upon which they have made their appraisal, there is nothing for review, and their report should not be disturbed."

That language was never intended to apply to a case of this kind—a case conspicuous for the utter disregard displayed by the commissioners for the important trust that devolved upon them in consequence of their appointment.

It appears that the amount of damages was fixed by each of the three commissioners putting down an amount and then dividing the sum total by three. The land taken was thus estimated at $1,000 per acre, when one of the commissioners, as he states, did not know anything of the value of the land, did not think it was very valuable, did not determine in his own mind what it was worth, and did not put any special value on it in making his estimate.

The second commissioner says the land taken was in a wet place; that adjacent lands were selling at $100 per acre, and that, in his opinion, was what they were worth; but, still, from the best information he could obtain, he valued the land taken by plaintiff at $1,000 per acre. He erroneously assumed, as the evidence shows, that the land taken constituted a part of the Harlem town-site, and acting on this sheer assumption, he took that into consideration. The third commissioner stated, that he regarded the land along the plaintiff's road worth from $100 to $200 per acre; that the highest value of that land was the latter sum.

In addition to that the commissioners gave $1,600 additional damages for injury done to the other land of the defendants (though it does not specially appear in what that injury consisted), and, in estimating the amount of land taken, there was included in the estimate the land embraced within the "Y" and also a strip of land eight hundred feet long by fifty feet wide, running parallel with the Hann. & St. Jo. R. R., for neither of which pieces had plaintiff asked. The amount actually asked for was not quite four and a half acres; so that, in its practical effect, the estimate of the value of the land was really $2,000 per acre, in addition to which the commissioners gave, as before stated, what might be termed a *bonus* of $1,600 more.

The testimony of other witnesses, who were introduced, taken as a whole, does not materially vary as to value per acre from that of the two commissioners who testified on that point.

In an ordinary case, where opinions as to value might very well be variant, we would not closely scrutinize the report of the commissioners on that score; but where, as in the present instance, the damages assessed by them are so flagrantly excessive; where there are such manifest indications on their part of an entire lack of appreciation of the duties and responsibilities of their position; such obliviousness of the rudimentary principles of fairness and impartiality,

we cannot, consistently with our ideas of duty, hesitate to interfere.

The judgment is reversed, and the cause remanded. Judge Vories absent; the other judges concur.

STATE OF MISSOURI, Appellant, *vs.* JNO. G. BROWNING, Respondent.

1. *Peddlers—License—Statute, constitutionality of.*—The statute requiring a license from peddlers is unconstitutional, the decision of the United States Supreme Court being a binding authority. (Welton v. Missouri, U. S. Sup. Ct., Oct. Term 1875.)

Appeal from Harrison Circuit Court.

D. S. Alvord, for Appellant.

WAGNER, Judge, delivered the opinion of the court.

The defendant was indicted for selling goods without a license, under the provisions of the statute concerning peddlers. He demurred to the indictment, on the ground that the act was unconstitutional, and the court sustained the demurrer, and gave judgment in his favor, from which the State has prosecuted its appeal. In the case of the State vs. Welton (55 Mo., 288) this same question was presented, and it was held, that the act in regard to peddlers was a valid law. But an appeal was prosecuted from our judgment in that case to the Supreme Court of the United States, and in the national court the judgment of this court was reversed, and the law was decided to be unconstitutional. (Welton vs. Missouri, Sup. Ct. U. S., Oct. T. 1875.)

As this decision is binding authority, the judgment of the court below must be affirmed. All the judges concur, except Judge Vories, who is absent.

STATE OF MISSOURI, Respondent, *vs.* ANNIE E. WISTER, Appellant.

1. *Practice, criminal—Keeping bawdy house—Indictment—Time.*—In an indictment for keeping a bawdy house, it is not necessary to specify any time. (Wagn. Stat., 1090, § 27.)
2. *Chillicothe, City of—Charter—Offenses—Bawdy houses—Exclusive jurisdiction.*—The municipal authorities of the city of Chillicothe have not exclusive jurisdiction in proceedings against the keepers of bawdy houses. (Sess. Acts 1869, p. 102, § 9.)
3. *Practice, criminal—Autre fois convict, plea of—Allegations and proof.*—A plea of *autre fois* convict must allege, and the evidence must show, that the offense, for which the defendant was convicted, is identical with that charged in the indictment.

Appeal from Livingston Circuit Court.

John E. Wait, for Appellant.

I. The city court had full and exclusive jurisdiction of the offense, and the circuit court could take no cognizance of it whatever, except upon appeal. (Sess. Acts 1869, pp. 104, 105, 106, § 2, sub-divisions 25, 11, 9; Id., 102, §§ 9, 11; Ordinances of City of Chillicothe, 65, §§ 7, 9; State vs. Gordon, 60 Mo., 383; State vs. Clarke, 54 Mo., 17, and cas. cit.) "Particular attention is to be considered in the nature of an exception." (State vs. Binder, 38 Mo., 450; State vs. Macon Co. Court, 41 Mo., 453; 47 Mo., 146; Cool. Con. Lim., 198, n. 3; Dill. Mun. Cor., § 54; Bishop Cr. Law, § 58, n. 3.)

II. The judgment in the recorder's court was, that the defendant was guilty of keeping a bawdy house, with no qualifications as to time, and this would cover the entire time up to the time of the trial (Wagn. Stat., 913, § 3), and the defendant could not be tried again for committing the offense during that time. The whole time was covered by the judgment in the recorder's court.

John A. Hockaday, Att'y Gen'l, for Respondent.

I. The indictment states sufficient facts. It covers the offense of the statute. (Wagn. Stat., 502, art. 8, § 19.)

II. It is not necessary to state any time, where time is not of the essence of the offense. (Wagn. Stat., 1090, § 27; 26 Mo., 306; State vs. Wilcoxen, 38 Mo., 370.)

III. Art. 3, sec. 9, of the city charter of Chillicothe, did not repeal the general laws of the State. (12 B. Mon., 25; St. Louis vs. Bentz, 11 Mo., 62; 29 Mo., 330.)

SHERWOOD, Judge, delivered the opinion of the court.

The defendant was indicted and convicted of the offense of keeping a bawdy house. The indictment is in accordance with the common law forms, contains the substance of the statutory offense, and is well enough. It is true, that no time is specified in the indictment, nor was this necessary; time was not of the "essence of the offense." (Wagn. Stat., 1090, § 27; State v. Wilcoxen, 38 Mo. 370.) The judgment against the defendant finds that the offense charged was committed on the first day of January, 1875. On the 2nd of February, 1875, prior to her arrest under the indictment, the defendant was arrested and fined by the city authorities of Chillicothe for keeping a bawdy house. At the trial the defendant put in a plea to the jurisdiction and also of *autrefois convict*. The plea to the jurisdiction was properly held as constituting no bar to the prosecution by the State. The charter of the city of Chillicothe does not confer exclusive jurisdiction on the municipal authorities of that city over the class of offenses charged in the indictment, and if the charter does not bestow such exclusive cognizance, as a matter of course it can have no existence. (State vs. Harper, 58 Mo., 531.) Because the city recorder, by virtue of the provisions of § 9, art. 3 of the charter (Sess. Acts 1869, p. 103), is invested with "exclusive jurisdiction over all cases arising under any ordinance of the city," it by no means follows that the position taken by defendant's counsel is correct. And this case is totally unlike that of the The State vs. Gordon, (60 Mo., 383), for there, by the terms of the charter, exclusive jurisdiction in a certain class of misdemeanors was conferred on the city council of Liberty. Here it is otherwise. The plea, conviction, was bad

on its face. It did not allege that the offense, of which the defendant was convicted before the city recorder, was identical with that charged in the indictment, nor did the evidence adduced have the slightest tendency in that direction. Both these points are essential as matters of pleading and proof in proceedings of a criminal nature. (3 Greenlf. Ev., § 36, and cases cited.) For these reasons there was no error in the action of the court below, and its judgment is affirmed. Judge Vories absent; the other judges concur.

STATE OF MISSOURI, Appellant, *vs.* AMOS CARPENTER, Respondent.

1. *Practice, criminal—Indictment—Sunday.*—An indictment charged, that the defendant "unlawfully did labor and perform work other than the household offices of necessity, or other work of necessity or duty, on the first day of the week, commonly called Sunday, by then and there hunting game against the form of the statute," etc. *Held,* that the indictment did not pursue the language of the statute, either within the intention or scope, nor did it charge any offense against the laws of this State. (Wagn. Stat., 504, § 32.)

Appeal from Clinton County Circuit Court.

Jno. A. Hockaday, Att'y Gen'l, for Appellant.

I. Where words of a similar import are employed in an indictment, it is not necessary to pursue the language of the statute literally. (25 Mo., 426; 48 Mo., 93; 15 Mo., 515.)

II. Hunting on Sunday does not come within the exceptions of either a work of necessity or charity, and is therefore labor within the meaning of the statute.

Roland Hughes, for Appellant, cited State vs. Ambs 20 Mo., 214.

WAGNER, Judge, delivered the opinion of the court.

The indictment in this case charged, that the defendant "unlawfully did labor and perform work other than the

household offices of necessity, or other work of necessity or duty, on the first day of the week, commonly called Sunday, by then and there hunting game, against the form of the statute," etc. The court sustained a demurrer to the indictment.

The statute under which the indictment was drawn, says: "Every person, who shall either labor himself, or compel or permit his apprentice or servant, or any other person under his charge or control, to labor or perform any work, other than the household offices of daily necessity, or other works of necessity or charity, on the first day of the week commonly called Sunday, shall be deemed guilty of a misdemeanor, and fined not exceeding fifty dollars."

The indictment does not pursue the language of the statute, either within its intention or scope, nor does it charge any offense against the laws of this State.

Let the judgment be affirmed. All the other judges concur, except Judge Vories, absent.

STATE OF MISSOURI, Appellant, *vs.* H. S. BERRY, Respondent.

1. *Practice, criminal—Indictment—Motion to quash—Objections, how stated.*—A motion to quash, or demurrer to, an indictment, shall distinctly specify the grounds of objection, or it must be disregarded, and no reason not specified shall be held to sustain such motion or demurrer. (Wagn. Stat., 1090, § 24.) A motion to quash an indictment, which only stated, that no crime against the law of the State was charged, and that the indictment did not state facts which authorized the court to put the defendant upon trial, cannot be sustained.

Appeal from Clinton County Circuit Court.

John A. Hockaday, Att'y Gen'l, for Appellant.

R. Hughes, for Appellant.

The three causes attempted to be set up by the defendant, as a cause for quashing the indictment, are not sufficient,

for the reason that they do not distinctly specify the grounds of objection to the indictment. The specific defect must be pointed out. (Wagn. Stat., 1090, § 24; State vs. Van Houten, 37 Mo., 357; State vs. Marshall, 47 Mo., 378.)

WAGNER, Judge, delivered the opinion of the court.

The defendant was indicted for exercising the trade or business of a public auctioneer without license.

A motion to quash was sustained to the indictment, and the causes set forth in the motion merely stated in general language, that no crime against the laws of the State was charged, and that the indictment did not state facts which authorized the court to put the defendant upon trial. The statute provides that a demurrer to, or a motion to quash, an indictment, shall distinctly specify the grounds of objection to the indictment, unless it does so it shall be disregarded, nor should any reason be held to sustain such demurrer or motion not specified therein. (Wagn. Stat., 1090, § 24.) The causes assigned for quashing were too general and pointed out no specific objection. They should therefore have been disregarded.

The judgment must be reversed, and the cause remanded. The other judges concur, except Judge Vories, who is absent.

STATE OF MISSOURI, Respondent, *vs.* JAMES W. STONUM, Appellant.

1. *Practice, criminal—Trials—Instructions to be given.*—In all criminal cases it is the duty of the court to instruct the jury as to the law; if the instructions offered are objectionable, the court should proceed to give such as the law requires.

Appeal from Clinton County Circuit Court.

Porter & Merryman, for Appellant, cited State vs. Mathews, 20 Mo.. 55; McKnight vs. Wells, 1 Mo., 13; State vs. Cooper, 45 Mo., 65; Wagn. Stat., 1106, § 30.

J. A. Hockaday, Att'y Gen'l, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

The defendant was convicted of petit larceny, and the only point now relied upon in this court is, that no instructions were given by the court. In the State vs. Mathews (20 Mo., 55) it was expressly adjudged, that it is the duty of the court in all criminal cases to instruct the jury, as to the law; that if the instructions offered are objectionable, the court should proceed to give such as the law requires. Aside from this being binding authority, we think it is sustained by good reason. Juries should not be allowed to guess at the law in such cases. The court should instruct them as to their duties and as to the law in the case. Reversed and remanded. All the judges concur, except Judge Vories, who is absent.

STATE of MISSOURI, Respondent, *vs.* WILLIAM WARE, Appellant.

1. *Practice, criminal—Indictment—Grand larceny—Ownership, how alleged.*—In an indictment for grand larceny, in alleging ownership of the property stolen it is not necessary to use the exact words of the statute, if words of equivalent import are employed; as, goods and chattels of one B., instead of "belonging to" B. (Wagn. Stat., 456, § 25.)

2. *Evidence—Statements—Res gestæ.*—Several armed men concealed themselves in the woods near where a horse was tied. The defendant came there on horseback, when a gun was leveled at him, and he was told to dismount and surrender himself. He did so, and said if they would wait he would tell everything. He did so, and afterwards all parties dispersed and went home. *Held*, that the statement was voluntary and was admissible in evidence as part of the *res gestæ*. But a statement, made that day to a neighbor, who invited him to stay all night with him, that he could not stay, because he had been using a mare which did not belong to him without permission; that he had

tied her in the woods and must go and take her where he got her, and turn her loose there, is not a part of the *res gestæ*, and is not admissible.

3. *Crimes—Larceny—Intent.*—To constitute larceny the intention to steal must have been formed at the time of the taking.

4. *Practice, criminal—Trial—Instruction—Good character—Evidence.*—An instruction in a criminal case, that evidence of good character in connection with slight evidence, ought not to be permitted to overcome strong and positive evidence to the contrary, is not liable to the objection that it assumes the evidence outside of defendant's character to be slight.

5. *Practice, criminal—Trial—Instructionon questions not presented.*—In a criminal case an instruction should not be given where there is no evidence relating to the propositions therein contained.

Appeal from Livingston County Circuit Court.

Collier, Dixon & Dixon, for Appellant.

I. The declarations of Ware to Francis and others were improperly admitted in evidence, because they were extorted by fear, and made under circumstances calculated to produce fright and terror in said Ware. (State vs. Brockman, 46 Mo., 566, and authorities cited.)

II. The court erred in refusing to allow appellant to prove the statement as made by him to Coy and Carpenter on the 1st day of June, 1875, relating to the possession of the mare in question, showing where he caught her, and for what purpose, and that he made no attempt to conceal the fact that he had that day taken her on the prairie. (3 Greenl. Ev., § 157.)

III. The instruction, concerning the county where the mare was taken, or to which it was brought, is objectionable, because there was no evidence on the subject, and the indictment was not framed to cover such a proposition. (Wagn. Stat., 1089, § 19.)

IV. If the original taking was without any felonious intent, appellant was guilty of a trespass only. (State vs. Conway, 18 Mo., 321; State vs. Sherman, 55 Mo., 83.)

V. The indictment is insufficient. It charges appellant with stealing "one bay mare, of the goods and chattels of one Alfred Mennich," when, by the statute in such cases, the

mare ought to have been designated in the indictment as "belonging to" the said Alfred Mennich. The words "belonging to" imply an owner, and the words "goods and chattels" do not.

VI. The whole testimony in the case fails to show that any offense beyond a mere trespass was committed at all. (3 Greenl. Ev., § 161; 2 Bish Crim. Law., §§ 863, 755.)

Jno. A. Hockaday, Att'y Gen'l, for Respondent.

I. The confessions of the defendant were properly admitted to go before the jury. They were entirely voluntary. (Hawkins vs. State, 7 Mo., 190.)

II. The statements of the accused to third parties as to how he came in possession of the stolen property, were clearly inadmissible. A party cannot make statements exonerating himself from guilt, and introduce the same before a jury as evidence of his innocence. The statements sought to be proved were no part of the confession, and constituted no part of the *res gestæ*, and were therefore inadmissible. (19 Mo., 365.)

III. The indictment is good. The omission of the words "belonging to" is supplied by the use of other language meaning the same thing. (25 Mo., 426; 48 Mo., 93; 15 Mo., 515; Whart Am. Crim. Law, §§ 402, 1811.)

Wagner, Judge, delivered the opinion of the court.

The defendant was indicted and convicted of grand larceny for stealing a mare, and sentenced to the penitentiary for two years. The questions raised in this court are; the validity of the indictment; the action of the court below in admitting and excluding testimony; the giving and refusing instructions; and the overruling of defendant's motion for a new trial.

The indictment charges defendant that "one bay mare of the value of one hundred dollars, of the goods and chattels of one Alfred Minnick, then and there being found, felon-

iously did steal, take and carry away," etc. The statute defines grand larceny to be the felonious stealing, taking and carrying away of the money, goods and personal property, belonging to another. (Wagn. Stat., 456, § 25.) The pleader in the indictment here charges, that the mare was the property of Minnick, instead of alleging, in the precise language of the statute, that she belonged to him. But this will not vitiate the indictment, as a statutory offense is substantially charged. The exact words of the statute are not used, but words of equivalent import are employed, and that is all that is necessary.

It appears that the mare, charged to have been stolen, was found tied in the woods some distance from the road, and some men went armed to the vicinity of the place and concealed themselves, and waited to see who would come and get her. In a short time the defendant approached, riding another horse, and a gun was levelled upon him, and he was ordered to dismount and surrender himself. This he did willingly, and told the men, if they would wait, he would tell them all about the affair. He then stated, that he had been walking, hunting his own horses, and becoming tired, he had found the mare running on the range and caught and rode her; that afterwards, fearing that his riding her without authority might create suspicion, he had tied her up and determined to wait till late in the evening, and then get her, and turn her loose where he found her. His counsel objected to this statement being given in evidence, because it was not voluntary, but the court overruled the objection. There is nothing in the record to show that it was not purely and wholly voluntary. No threats were made against the defendant whatever; no inducements of any kind were held out to him, nor had any of the persons present any authority. They did not arrest or detain him, or exercise any coercion over him; they separated and went to their homes, and he was permitted to do the same thing. What he said, he said of his own free will and accord, and there is

nothing in this evidence which brings it within the rule prohibiting the admission of involuntary confessions.

The defendant offered to prove that on the same day, whilst riding along the road, he was invited by a neighbor and acquaintance to stop and stay all night with him, and he refused, and told him as a reason for his refusal, that he had been using a mare, that did not belong to him, without permission, and that he had tied her out in the woods to avoid suspicion, and that he must go and take her back and turn her out where he first found her. This evidence was ruled out, and its exclusion is relied on as error. A party cannot manufacture evidence for himself, or give his own declarations in his favor, when they are disconnected with the transaction which they are seeking to explain. Declarations may be received as part of the *res gestæ* when they are made contemporaneously with, and illustrative of, the fact about which they are spoken.

It is upon this principle, that the declarations and statements, made by the defendant to the persons who were present when he came to where the mare was hitched, were admissible in evidence, either for or against him.

They related to the subject matter, concerning which they were made, when it was actually present and in view of them all. But the testimony that the defendant offered was of a totally different character. It was not connected with the possession of the mare, and there was nothing to show that he had ever had her in his possession, except his mere conversation when she was at a distance. It could not, therefore, be construed into a part of the *res gestæ*, and was properly rejected.

Several objections are made in reference to the giving and refusing of instructions, all of which it will be unnecessary to notice. It is contended, that error was committed in refusing defendant's second instruction, which declared that: "To find the defendant guilty under the indictment, the jury must believe from the evidence that the defendant, at the time he

caught said mare, took her with the felonious intent to convert her permanently to his use."

This instruction was unquestionably the law, and should have been given.

To constitute larceny, the intention to steal must have been formed at the time of the taking. (State vs. Shermer, 55 Mo., 83, and cases cited.) It is true, that the next instruction given by the court partially rectified the error in refusing the second instruction, though it is not characterized with that specific clearness which marked the former, which was undoubtedly the law. The instruction given for the State, respecting the proof of good character, is not liable to the objections that have been made against it. Counsel have erroneously argued, that it assumes that the evidence outside of defendant's character was slight; but this is a mistake; it assumes nothing; it only tells the jury that evidence of good character in connection with slight evidence ought not to be permitted to overcome strong and positive evidence to the contrary.

But the court afterwards tells the jury, that they are the judges of the evidence, and its weight belongs exclusively to them. Besides, in reference to the proof of good character the court gave an instruction for the prisoner exceedingly favorable. On the part of the State, the court gave an instruction, "that, although the jury may believe the mare was originally taken in Daviess county, yet, if they further believe, that, with the intent to steal and convert the mare to his own use, the defendant brought her into this, Livingston, county, they will find him guilty." When property is stolen in one county and brought into another, the statute permits the offender to be indicted, tried and convicted, in the county in which the property is brought. (Wagn. Stat., 1089. § 19.)

But the objection to the instruction is, that there was no evidence which justified its being given. It was not shown on the part of the State, that the mare was taken in Daviess county, and brought into Livingston county. No effort was made to prove a venue in either county.

The witnesses testified to the mare being on the prairie in the bottom, and finding her near a creek, but in what county or State is all left blank.

It, therefore, becomes of no moment to consider the motion for a new trial founded upon newly discovered testimony.

The judgment should be reversed and the cause remanded. All the judges concur, except Judge Vories, who is absent.

INDEX.

ABATEMENT; See Practice, civil, 1, 2; Practice, civil—Pleadings, 3, 4.
ABSENCE; See Evidence, 1, 2, 3, 4, 8, 9; Limitations, 6.
ACKNOWLEDGMENT; See Conveyances; Sheriffs' sales, 4.
ADMINISTRATION.

1. *Administration—Granting of letters prima facie proof of death.*—In suit by an administrator on a policy of life insurance taken out by deceased, where defendant admits plaintiff's appointment, but merely denies its legality, and the proof shows annual settlements made by him, it will be presumed that letters were granted. And the granting of the letters is *prima facie* evidence of the death of the intestate. But such presumption is of the weakest and most inconclusive character, and the very slightest evidence will be sufficient to overcome it.—Lancaster, Adm'r, vs. Washington Life Ins. Co., 121.
2. *Administrator—Misapplication of assets—Action by creditors for sale of real estate, etc.—Remedy on the bond, when.*—Where the administrator has been guilty of malversation and misappropriation of the assets, and upon a proper accounting, enough would be found in his hands to pay the debts of the estate, the creditors are not entitled to a sale of the real estate in the first instance, in order to satisfy their claims. (Wagn. Stat., 97, § 25.) If the personal estate becomes insufficient to pay the debts in consequence of *devastavit*, or the administrator's neglect of duty, the remedy primarily is on his bond.—Merritt vs. Merritt, 150.
3. *Executor carrying on trade of testator—Responsibility for losses, rule as to.*—When the executor carries on the trade of the testator under provisions contained in articles of co-partnership, or directions in the will, or a decree of the Chancellor, he is accountable for the profits realized, but not for losses. But where he adventures the fund in business of his own, or of others, distinct from the management of the estate, from which he expects to derive a benefit beyond the legal rates of interest, he must make the fund good for all losses with at least lawful interest, or, if a greater rate be received, he must also account for that.—Id.
4. *Administrators—Measure of responsibility for the investment of funds.*—The now prevailing rule is, that executors and administrators stand in the position of trustees for those interested in the estates upon which they administer, and in the investment of funds, are liable only for want of due care and skill, *i. e.*, such as prudent men exercise in the management of their own affairs.—Id.
5. *Administration—Widow left as administratrix in charge of a hotel of her deceased husband—Case stated—Measure of responsibility.*—A testator left half his estate to his widow who was also his administratrix, and it included a hotel, furnished and in operation, which she could not dispose of, except at great sacrifice until the lapse of a year or more. It appeared that she acted throughout without an order of the probate court, but in the most entire good faith.

ADMINISTRATION, continued.

Held, that she was not interested in a speculation of her own, but only endeavoring to preserve and take care of the effects till they could be sold to advantage; that the accruing rent paid by her was a charge on the estate, and she was entitled to a credit for it; that she should be charged with whatever rents and profits were derived from it, and, generally, should be governed by that measure of responsibility affecting trustees in the administration of their trusts.—Id.

6. *Practice, civil—Abatement of suits—Suggestion of death—Exhibition of demand against administrator.*—The provision of the administration law, allowing two years within which to exhibit demands against an estate, does not render nugatory the requirement that the legal representatives of a deceased party must be brought in on or before the third term after the suggestion of his death.—Rutherford vs. Williams, 252.

7. *Executor—Indebtedness to testator not treated as cash on hand.*—Under the statutes relating to that subject (See Wagn. Stat., p. 87, § 32; p. 110, § 18, and compare with id. p. 84, §§ 2, 3), where the executor is indebted to the estate, his debts are not to be treated as so much money, actually on hand, but are to be placed on the same footing with debts due the estate from other sources.—McCarty, Adm'r, vs. Frazer, 263.

8. *Executors—Action against sureties of, by motion under statute—Proof as to solvency—Order of distribution.*—In proceedings by an administrator *de bonis non* with the will annexed against sureties of the executor, by motion under § 67 of the administration law, (Wagn. Stat., p. 81) held, that evidence, at the time of the revocation of his letters showing the insolvency of the executor, was competent. And held, that in such proceedings proof of an order of distribution made by the probate court prior to their institution, directing the executor to pay a certain sum to legatees, was *res inter alios acta* and improper.—Id.

9. *Administration—Annual settlements of administrators, etc., nature of—Final settlements.*—Annual settlements of administrators, curators, etc., are mere exhibits, which are merged in final settlements, and when the final settlements are set aside, they are fully open to examination and correction for fraud, without the necessity of asking to have them set aside.—Sheetz vs. Kirtley, 417.

10. *Administration—Final settlements of guardians—Probate courts, judgments of nature of—When set aside.*—Final judgments of the probate court stand on a footing of equality with final judgments of the circuit court with reference to annulling them for fraud, and final settlements of administrators, guardians, and curators, have the force and effect of judgments, and can only be set aside in equity when they have been fraudulently procured.—Id.

11. *Conveyances—Covenant against incumbrances, to whom survives—Administrator.*—A covenant against incumbrances in a conveyance is personal, and an action thereon may be brought by the administrator.—Kellogg vs. Malin, 429.

12. *Administration—Annual settlements—Final settlement—Probate court, right of to examine and rectify prior settlements.*—Upon final settlement of an executor's accounts, the probate court has a right to examine the prior accounts and settlements, and rectify all mistakes therein.—In re James L. Davis, Ex'r, 450.

ADMINISTRATION, continued.

13. *Administration—Money in hands of executor or administrator—When interest chargeable—Statute, construction of.*—Whether an administrator shall be charged with interest on money in his hands belonging to the estate, is to be determined by the circumstances of each case. (Wagn. Stat., 90, § 55.) Where the executor has let the money lie and heedlessly neglected to make it productive, the court may not visit him with a heavy penalty; but where he has used the money for his own purposes or for his own private gain, then the highest rate of interest allowed by the law may well be imposed. (Id., § 54.)—Id.

14. *Administration—Money in hands of executor—Interest charged.*—An executor at an annual settlement in 1871 showed some funds in his hands, and all debts proved up had been paid. At his final settlement, three years later, he made no further charge except for taxes and expenses of administration. It appears, that after the settlement of 1871 the executor had mingled the money with his own; that he deposited it in bank to his own credit, and drew it out and used it as his own, and no reason was shown for the delay in making final settlement. The court, at final settlement, charged him with various items for which he had failed to account, and also with interest at eight per cent. from his settlement of 1871, with annual rests. *Held*, that the action of the court was right, and that the executor might well have been charged with ten per cent. interest.—Id.

15. *Administration—Annual settlements—Final settlements—Division of estate—Compromise.*—In proceedings to set aside a final settlement of an administrator mistakes in annual settlements can be corrected, and the fact, that the heirs compromised a suit as to the validity of the will on the belief that such annual statement was correct, can have no effect on this suit. They might, with other circumstances, have some weight to set aside the compromise.—Williams, Adm'r, vs. Heirs of Petticrew, 460.

16. *Administration—Final settlements—When to be assailed.*—Final settlements of administrators, curators, etc., must be seasonably and directly assailed in order to avoid their effect as judgments imparting absolute verity.—Id.

17. *Administration—Final settlement—Estates of father and son.*—In a suit on the final settlement of A's estate, items allowed in the final settlement of the estate of B., father of A., by the same executor cannot be assailed, not being a matter before the court.—Id.

18. *Administration—Final settlement—Items questioned.*—In a suit on the final settlement of an administrator concerning certain charges it was *held:*

(*a.*) Where an administrator inventoried certain slaves, which were emancipated while in his hands, that he was not chargeable therefor.

(*b.*) Where the administrator under a power of attorney borrowed money for a trip for the deceased, that an itemized account of expenses, together with the balance in his hands should be filed; otherwise the claim should be disallowed.

(*c.*) Where the administrator in good faith and under advice of counsel took a trip to look after the estate, his claim should be allowed; where sufficient testimony, explanatory of such claim is not offered, the claim should be disallowed.

ADMINISTRATION, continued.

(*d.*) A claim for money paid as a penalty on taxes should be disallowed, when such penalty accrued by the administrator's neglect.

(*e.*) The time to obtain credit for worthless notes is at the final settlement, and the fact, that the administrator carried such notes on his annual settlements with no mention of their worthlessness, is not conclusive upon him, and the question, whether he exercised due diligence in collecting them, is a matter of fact to be determined by evidence.

(*f.*) If when the administrator receives a note, the makers thereof are solvent, but afterwards become insolvent, the burden of proof is on him to prove, that with due diligence he could not have collected it; and in the absence of such proof, the claim should be disallowed.—Id.

19. *Administration—Final settlements—Notes—Money— Interest, when chargeable.*—On notes in his hands bearing 10 and 6 per cent. interest, the administrator should be charged respectively such interest; on money in his hands legally accounted for, he should be charged such interest as he actually received when invested under the orders of the court; when such orders, if any, were departed from, then with such interest as he might have received if they had been complied with; on money in his hands not reported according to law, but used by him, he should be charged ten per cent. interest computed with annual rests; on notes properly returned as insolvent, he shall be credited with the principal and the same rate of interest with which he was charged thereon.—Id.

See Dower, 1, 2; Justices' Courts, 1; Witnesses, 1.

ADMISSIONS; See Bond, 1.

ADVERSE POSSESSION; See Land and Land Titles, 2, 3.

AGENCY.

1. *Agent—Authority of, how proved—Adoption of acts.*—Where a person has recognized another as his agent, by adopting and ratifying his acts done in that capacity, he will not be permitted to deny the relation to the injury of third persons, who have dealt with him as such.—Summerville v. The Hann. & St. Joe. R. R. Co., 391.

2. *Agent—Judgment obtained by neglect—Liability of principal.*—Mere neglect of an agent or attorney to defend a suit will not discharge the principal from the judgment obtained, unless there was a fraudulent combination or collusion, participated in by the plaintiff—Matthis v. Town of Cameron, 504.

3. *Principal and Agent—Agency, how proved—Knowledge of facts—Subsequent adoption.*—Where the principal has previous knowledge of all the material facts, an agency may be proved by subsequent ratification and adoption.—Middleton vs. The K. C., St. Joe. & Council Bluffs R. R. Co. 579.

4. *Evidence—Judgments between other parties—Agency—Estoppel.*—In a suit by A. against B. for work done at the employment of B.'s agent, a judgment of B. against the agent is no evidence against A.

See Bills and Notes, 8; Common Carriers, 5; Counties, 1; Court, County, 1; Evidence, 12; Mortgages and Deeds of Trust, 18; Practice, criminal, 10; Replevin, 4; Revenue, 1.

AGREED CASE; See Practice, civil, 3.

AMENDMENT; See Damages, 4; Practice, civil—Pleading, 2, 11, 12, 13, 15.

APPEALS; See Practice, civil—Appeals; Practice, criminal, 1; Scire Facias, 3.

ATTACHMENT.

1. *Garnishment of one indebted to a partnership of which defendant in the attachment is a member—Power of court to compel partners to interplead.*—In an action by attachment against an individual, a person is not liable to garnishment who is indebted to a co-partnership of which that individual is a member. And in such a proceeding the court has no power to compel the partners to come in and litigate their interests in the fund attached.—Sheedy v. Second Nat. Bank, Garn., 17.

2. *Attachment—Jurisdiction—Order on non-residents to interplead.*—In action of garnishment courts of this State have no authority to order non-residents to appear and interplead, and litigate their respective rights to the fund attached.—Id.

3. *Attachment—Garnishment of debt to a firm of which defendant is a member, how distinguishable from levy in attachment or execution.*—The garnishment in attachment of a debt owing to a firm of which defendant is a member, is distinguishable from the seizure on attachment or execution of the tangible property of a partnership, for the reason that in a sale under such seizure the property cannot be appropriated till all liens growing out of or related to the partnership are discharged, while in the case of garnishment the judgment against the garnishee, if acquiesced in, changes the right of property, and divests the co-partner's title to the property attached—which cannot be done so long as the partnership accounts remain unsettled or its debts unpaid.—Id.

4. *Attachment—Garnishment—What defense garnishee may set up, etc.*—Whatever defense the garnishee in attachment could set up against an action by the defendant for the debt in respect of which he is garnished, he may set up in bar of a judgment against him as garnishee.—Id.

5. *Garnishment—Garnishee liable for what manner of debt—Constr. Stat.—Adjustment of accounts, etc.*—The statute of garnishment (Wagn. Stat., 665, § 7) contemplates, that in order to render one liable as a garnishee, the debt which he owes defendant shall be of such a character, that upon being served with process, he may pay the amount, without being compelled to await the determination of a chancery proceeding requiring an adjustment of accounts between parties and partnerships. (Lackland vs. Garesche, 56 Mo., 267.)—Id.

6. *Attachment, levy of, on real estate—Writ from another county—Filing abstract—Sess. Acts* 1863-4, *p.* 7.—Prior to the act approved Feb. 11th, 1864 (Sess. Acts 1863-4, p. 7), it was not necessary for a sheriff, levying an attachment on a writ coming from another county, to file an abstract of his levy in the Recorder's office of his county.—Huxley vs. Harrold, 516.

7. *Attachment, levy of, on real estate—Notice to tenants—Sheriff's return.*—The sheriff's return of a levy of attachment on real estate need not state the notice to tenants, or that there were no tenants on the land. The statutory notice to tenants is not simultaneous with the act of levying the writ. (Lackey vs. Seibert, 23 Mo., 85; Durossett's Adm'r vs. Hale, 38 Mo. 346.)—Id.

8. *Judgments—Attachment—Defendant, appearance of—Land levied on in an another county.*—When a suit is instituted by attachment, and the defendant appears and defends, a general judgment is the only one authorized by the statute (Wagn. Stat., 189, § 40), and it need not recite any judgment lien, and the status of the case is not altered by reason of the land being in another county.—Id.

ATTACHMENT, continued.

9. *Attachment—Execution, sale under—What title passes.*—A sale under an execution on a suit brought by attachment conveys the title of the debtor, legal or equitable, to the land, discharged of all incumbrances created by him subsequent to the levy of the writ of attachment. (Wagn. Stat., 184, § 18; Lackey vs. Seibert, *supra*; Ensworth vs. King, 50 Mo. 477.)—Id.

10. *Practice, civil—Suits where to be brought—Real estate—Statute, construction of.*—The statute (R C., 1855, p. 1221, § 3) directing that suits affecting real estate shall be brought in the county, where the land or a part thereof is situated, refers to suits in equity, ejectment and the like, and not to attachment suits.—Id.

11. *Practice, civil—Attachment, suit by, where to be brought—Statute, construction of.*—Under the revised code of 1855, (p. 1221, § 2; p. 244, § 20) suits by attachment could be brought in any county where the defendant had property, real or personal, and separate writs might issue to other counties in which he had property.—Id.

See Garnishment; Husband and Wife, 10; Jurisdiction, 9; Malicious Attachment; Practice, civil—Pleading, 3, 4.

ATTORNEY AT LAW; See Agency, 2.

B.

BANKRUPTCY.

1. *Mechanics' liens—How affected by proceedings in bankruptcy—Permission to lienor to sue obtained from the U. S. court unnecessary.*—The jurisdiction of a State court to enforce a mechanic's lien, having attached, will not be divested by proceedings in bankruptcy instituted subsequently thereto. And the lienor may sue and obtain judgment and execution without an order from the United States court permitting him to prosecute his suit. And where the property is sold subject to the liens, the course for the lienor is to proceed against the property.—Seibel v. Simeon, 255.

2. *Bankruptcy, proceedings in—Dismissal of, effect of—Re-instatement—Bankruptcy act.*—After a dismissal of proceedings in involuntary bankruptcy, a reinstatement of the cause, without further notice or appearance, is absolutely void, and so are all proceedings thereunder. (U. S. Bankr. Act, §§ 39, 40.)—Gage v. Gates, 412.

BANKS AND BANKING.

1. *National bank cannot take real estate security for contemporaneous loan—Injunction.*—Under the Act of Congress (Rev. Stat. U. S., p. 998; See §§ 5136, 5137) a national banking association has no power to take a deed of trust on real estate as security for a contemporaneous loan; and it has no powers not conferred by congress. And injunction will lie to prevent a sale by the bank under the deed.—Matthews v. Skinker, 329.

BAWDY HOUSE, See Practice, criminal, 12, 13.

BILLS AND NOTES.

1. *Promissory notes—Unauthorized alteration—Subsequent ratification—Instructions—Failure to call attention of trial court to evidence—Burden of proof, etc.*—In suit on a promissory note, where defendant pleaded a material and unauthorized alteration of the note without his knowledge, and plaintiff's repli-

BILLS AND NOTES, continued.

cation denied such alteration of the paper, held, 1st, that, under the pleadings, evidence showing defendant's subsequent ratification of the change was incompetent, and that the instructions were not faulty, for ignoring such evidence; 2d, that, aside from the state of the pleadings, the Supreme Court would not pass upon the legal effect of such evidence, in the absence of instructions offered, directing the attention of the trial court to that question; 3d, that, under the pleadings, after the defendant had introduced testimony tending to show such unauthorized alteration, the burden was shifted upon plaintiff to show that the alleged alteration, at the time it occurred, was made by defendant's authority.—Capital Bank v. Armstrong, 59.

2. *Promissory notes—Alteration made without fraud, etc.—Effect on prior indorser.*—The mere fact that the alteration of a note is not made fraudulently, nor for the purpose of changing its legal effect, will not change the rule as to the liability of a prior indorser.—Id.

3. *Promissory note—Alteration putting on inquiry—Indorser not bound where alteration was subsequent to his indorsement, unless, etc.*—The indorser of a note will not be held bound by a fraudulent alteration made subsequently to his indorsement, unless through negligence the instrument has been so loosely drawn as to easily admit of alteration, and in a manner not calculated to place a man of ordinary prudence on the alert. But where no blank space was left unfilled, and the rate of interest was, after indorsement and without the knowledge of the indorser, inserted by interlineation in ink of a different color from that employed in the remainder of the note, it was held that the instrument upon its face bore such indications as should have excited suspicion and provoked inquiry; and that under such circumstances the indorser was not bound.—Id.

4. *Promissory note—Suit on—Interest clause, insertion of—Proof as to other notes, etc.*—It is not competent, in order to show that a party to a note in suit, has authorized the insertion of a clause respecting interest, to show that he was a party to other notes containing similar clauses.—Iron Mountain Bank v. Murdock, 70.

5. *Promissory note—Alteration—Insertion of rate of interest—Question of alteration to be tried by the jury, when.*—In suit against the indorser on a promissory note, the defense being an unauthorized alteration, it appeared that in the bottom line, at the end of the note, was the printed form "for value received" without a printed blank following it, in which to insert rate of interest (*Sic* "with interest from —— at the rate of —— per 'cent. per annum"); but that in the blank space, commencing on the line with and directly following the words "value received," and running obliquely upward to avoid the signature, were written, after the paper left defendant's hands, the words "with interest at the rate of ten per cent. per annum after maturity." Nothing in the color of the ink used in the inserted clause, would readily excite suspicion. It was held that, although the note did not present a glaring case of alteration, yet enough appeared to authorize the court under appropriate instructions to leave to the jury the question whether the note was altered in such a manner as to put the plaintiff on inquiry at the time of his purchase. See Capital Bank v. Armstrong, *ante* p. 59.—Id.

BILLS AND NOTES, continued.

6. *Promissory note—Alteration—Insertion of rates of interest—Liability of prior party—Case stated.*—In a case where a note, framed on a printed blank, was complete at the time it left the hands of the party sought to be charged, but was so printed as to give an apparent authority to fill a blank space occupying the same position relative to the body of the note that an interest clause usually does, and the space left furnished ample room for inserting such clause, and the space was not filled in a way to attract observation, the court strongly inclined to the opinion that the defendant would be bound to an innocent holder.—Id.

7. *Note—Alteration—Fraud—Materiality—Subsequent assent, etc.*—After a note was completed, in the absence and without the authority or knowledge of the maker, the name of the payee was by the holder erased, by drawing a pen through it, and inserting in different ink, but apparently in the same handwriting, his own name; and it appeared that the note was in fact made for his benefit, and there was no evidence that the erasure was made with any sinister or fraudulent motive. *Held*, that although the alteration may not have been material or fraudulent, or opposed to the will of the maker, yet it operated to discharge him, and that proof showing that he afterward saw the note and made no objection, coupled with testimony that his attention was only directed to the signature, was not sufficient to establish his sanction of the alteration. (See Evans vs. Foreman, 60 Mo., 449, and Capital Bank vs. Armstrong, *ante*, p. 59.)—German Bank v. Dunn, 79.

8. *Practice, civil—Pleadings—Answer—Notes, defenses against—Agents' disobedience, ratification of.*—Where a party orders his agent at specified dates to make sales for him, and receives an account of sales from him, and subsequently gives the agent notes for the balance due on such sales, with full knowledge that his instructions had been disobeyed, he cannot, in a suit on such notes by the agent, urge as a defense thereto that his instructions were disobeyed and he was damaged thereby, and that the notes were without consideration.—Beall vs. January, 434.

9. *Practice, civil—Pleadings—Answer—Notes—False representations.*—In a suit on a note by the payee, the maker alleged that he employed the payee to make sales for him, directing him to sell when the market price would yield a profit to the maker; that the payee falsely and fraudulently represented that he had sold the goods to the best advantage, but still at a loss, and the maker relying on said representations, had made the notes to cover the loss to the payee; that in fact the representations were false, and that the goods could have been sold at a profit, and that the notes were without consideration, *held*, that this was a good defense.—Id.

10. *Bills and notes—Collateral security—Debt then created—Holder for value.*—One who takes a note as collateral security for a debt then created and on the faith thereof, with notice of no equities, becomes a holder for value.—Logan vs. Smith, 455.

11. *Mortgages—Note secured by transfer of—Release.*—The transfer of a note secured by mortgage carries the mortgage with it, unless the mortgage has been separately extinguished, as by a release for instance.—Id.

BILLS AND NOTES, continued.

12. *Mortgages—Note secured by—Indorsee for value—What rights under the mortgage.*—The indorsee of a negotiable note, who takes it discharged of the equities to which it was subject in the hands of the payee, acquires the same right in a mortgage given to secure it, which the payee would have had, if no equities had ever existed against the note. (Linville vs. Savage, 58 Mo., 248, reviewed.)—Id.

13. *Commercial paper—Town warrants.*—Warrants of towns in this State are not commercial paper.—Matthis vs. Town of Cameron, 504.

See Administration, 19; Mortgages and Deeds of Trust, 10, 11, 12.

BOATS AND VESSELS; See Insurance, Marine.

BOND.

1. *Bond—Admission of corporate capacity of obligee, what acts amount to.*—The obligors on a bond given to a corporation, by making and signing the instrument, admit the corporate capacity of the obligee and in suit on the bond cannot plead *nul tiel* corporation.—City of St. Louis vs. Shields, 247.

BURDEN OF PROOF; See Bills and Notes, 1.

C.

CAPACITY TO DEVISE; See Wills, 1.

CERTIORARI; See Officers, 1, 2.

CHARACTER; See Practice, criminal, 20.

CHATTEL MORTGAGE; See Mortgages and Deeds of Trust.

CHILLICOTHE, CITY OF; See Practice, criminal, 13.

CHRISTIAN CHURCH; See Corporations, religious, 1

CITIZENSHIP; See Jurisdiction, 1.

COMMON CARRIERS.

1. *Practice, civil—Trials—Common carriers, liability of—Election.*—If a petition against a common carrier states a good cause of action, it is immaterial whether it is based on the liability of the common carrier by common law, or on a special contract, and the court has no right to call on the counsel for any explanation of the petition.—Tuggle vs. St. L., K. C. & N. Rly. Co., 425.

2. *Railroads—Stock, transportation of—Receipt of; what implied.*—The reception of hogs in the pens of a railroad company for transportation is equivalent to an obligation to transport them without unnecessary delay.—Pruitt vs. Han. & St. Jo. R. R. Co., 527.

3. *Railroads—Monopoly by government—Common carriers, duty of.*—If the government monopolizes a railroad, to relieve itself from liability the company should abdicate its functions as a common carrier for the public at large.—Id.

4. *Common Carriers—Railroads—Probable business—Duty as to providing for.*—When a common carrier can reasonably judge of the demands probably to be made on it, in addition to its ordinary business, it is presumed to have made arrangements to meet such demands without interfering with its ordinary business.—Id.

5. *Railroads—Station agents, power of, to contract for freight.*—Station agents are to be presumed to have power to make contracts for their railroads for the transportation of freight. The limitations on their powers the public cannot take notice of, unless they are conveyed to the public in such a manner as to authorize the inference that shippers are apprised of them.—Id.

COMMON CARRIERS, continued.

6. *Common carriers—Contracts—Unforeseen occurrences.*—Common carriers are excused from literal performance of their contracts if unforeseen occurrences, such as the law recognizes as sufficient, should occasion slight delays.—Id.

7. *Contracts, breach of—Damages, what allowable.*—The damages to be allowed on a breach of contract must be such as are foreseen, or might be foreseen, as likely to result from a breach of the contract or obligation assumed or implied.—Id.

8. *Railroads—Transportation—Snow storms—Delays.*—Snow storms of such violence as to obstruct the passage of trains must be allowed to excuse delays by a railroad in transporting articles during the continuance of the obstruction.—Id.

9. *Practice, civil—Trials—Stock, exposure of—Injury—Question for jury.*—Whether exposure of hogs in uncovered pens, for twenty-five days in December, might not reasonably be expected to result in considerable loss from exposure and smothering, is a proper question to be left to the jury.—Id.

10. *Railroads—Stock, transportation of—Negligence, when prima facie.*—A delay of twenty-five days in shipping one drove of hogs, and of forty-one days in shipping another drove, might be termed *prima facie* negligence on the part of the railroad, inexcusable unless by the total cessation of all business for the public.—Id.

COMPROMISE; See Administration, 15.

CONDEMNATION OF LAND; See Jurisdiction, 13; Railroads, 6, 7.

CONFLICT OF LAWS; See Limitations, 6, 7, 8, 9.

CONSIGNMENT; See Replevin, 4.

CONSTITUTION OF MISSOURI.

1. *Constitution—Special law, necessity of—Legislature.*—As to whether a general law can be made applicable, or whether a special act is necessary in a given case, the legislature is the exclusive judge. (See § 27, of Art. IV, of late Constitution).—Board of Commissioners, &c. vs. Shields, 247.

2. *Constitution—Special acts for "municipal purposes."*—Under §§ 4 & 5 of Art. VIII of the late Constitution special acts may be passed creating corporations for municipal purposes; but they must be connected with the municipality itself and instituted for the purpose of carrying on some of its known objects.—Id.

3. *Constitution—St. Louis slough ponds, act concerning—"Municipal purposes."*—By the terms of the act of March 14th, 1872, in reference to St. Louis slough ponds, (Adj. Sess. Acts 1872, p. 466,) three of the City Councilmen were made commissioners; the engineer was to supervise the work and make out the tax bill, assessing the due proportions between the city and the adjoining property holders. And before any action could be had touching the ponds, it was required that the Board of Health should declare them nuisances. The act was held to be for "municipal purposes" within the meaning of the constitution.—Id.

4. *Corporations acting under color of law—Corporate character, how questioned.*—If a corporation be acting under color of law, and be recognized as such by the State, its corporate character cannot be questioned collaterally. Such a question should be raised by *quo warranto*. And the rule prevails even though its incorporation may be affected by constitutional provisions.—Id.

See Legislature, 3, 4; Officers, 1, 3; Stock Law, 2.

CONSTITUTION OF UNITED STATES; See Peddler, 1.

CONTRACTS.

1. *Contract in restraint of trade—Illegality of.*—A contract not to engage in a particular trade for a specified time, "in the city of St. Louis, or at any other place" is divisible, and as to the restriction imposed in St. Louis, is not void as in restraint of trade.—Peltz vs. Eichele, 171.

2. *Sale of business—Claim of fraudulent representations.*—A contract, for the sale of certain property and business, cannot be defeated on the ground of fraudulent representations by the vendee that a certain person shall not engage in the business with himself, where the bargain is consummated after such intention has been learned, and the bargain is unconditional, and the purchase price is paid.—Id.

See Bills and Notes; Bond; Common Carrier; Counties, 1; Equity, 1; Husband and Wife, 9; Insurance, Fire; Insurance, Life; Insurance, Marine; Mortgages and Deeds of Trust; Partnership; Practice, civil—Pleading, 19; Replevin, 1, 2, 3; Sales.

CONVEYANCES.

1. *Equity—Quit-claim deed—Purchase without notice.*—The grantee in a quit-claim deed cannot maintain that he is a purchaser without notice of equities affecting his grantor.—Stoffel vs. Schroeder, 147.

2. *Shelley's case—Rule in, abolished in Missouri.*—Since the enactment of the statute of wills in 1825, § 18, and that respecting conveyances in 1845, § 7, the rule in Shelley's case has no longer any existence in this State. And a deed to "A.," or in trust for "A," for life, remainder over in fee simple to the heirs, creates simply a life estate in A.—Tesson vs. Newman, 198.

3. *Conveyance absolute on its face, a mortgage, when—Defeasance need not be in writing.*—A conveyance intended as a security for a debt, however absolute in form, will in equity be treated as a mortgage. And to convert it into a mortgage the defeasance need not be in writing.—O'Neill vs. Capelle, 202.

4. *Conveyance—Question whether conditional sale or mortgage, how determined.*—If a conveyance is proved to be in fact a sale upon condition, and not a mortgage, the intention of the parties will be effectuated. But in case of doubt, it will be treated as a mortgage; and the continued existence after the transfer is a decisive proof that the conveyance is of the latter kind.—Id.

5. *Marital conveyances—Undue influence, what not.*—Where property is accumulated in a great degree by the superior intelligence and active energies of the wife, and being thereto induced by his confidence in her, the husband makes to her a deed of his property, and it appears that the wife's influence, although great, was salutary and wholesome, and not exerted for fraudulent or selfish considerations, the deed will not be set aside on the ground of "undue influence," such as the law forbids. And it is immaterial as touching the legal rights of the parties in such case, that the confidence of the husband may have been misplaced.—Hollocher vs. Hollocher, 267.

6. *Deeds—Consideration clause—Parol evidence varying and contradicting, when proper.*—The consideration clause in a deed is always open to explanation or contradiction; certainly so, except as between the parties or their privies, where plaintiff seeks to set aside his own deed for lack of a consideration therein expressed to have been paid; and so bases his action on his own

CONVEYANCES, continued.

fraud; and subject to the exception, that the consideration clause, for the purpose of giving effect to the operative words of a deed, may be regarded as conclusive.—Id.

7. *Conveyance—Consideration expressed in deed—Impeachment of.*—Where suit is brought by the maker to set aside a deed on the ground that no consideration whatever passed, and that the same was obtained by fraud and undue influence, plaintiff cannot insist, that the consideration, expressed in the deed, was unconscionable, and cannot be attacked by parol evidence.—Id.

8. *Acknowledgment—Certificate only prima facie evidence.*—In a bill to set aside a conveyance, the certificate of the notary is only *prima facie* evidence of its recitals and may be contradicted. (Wannell vs. Kem, 57 Mo., 478.)—Sharp vs. McPike, 300.

9. *Separate estate of wife—Acknowledgment—Examination apart from husband.*—Where in a conveyance of land made in trust for the separate use and benefit of a married woman, she is authorized by any written order to direct a conveyance or mortgage, such instrument passes her title although her acknowledgment be not taken "separate and apart" from her husband.—Id.

10. *Conveyances, construction of—Incumbrances, covenant against—"Those under whom they claim"—"All claiming under him."*—A covenant in a deed by the grantors, that the land is free from all incumbrances, done or suffered by "those under whom they claim," refer to those from whom they derive title, while a similar covenant against the acts of "all claiming under him" would probably be construed to have a different signification, and would not be held to include a vendee of the entire estate of the grantor.—Williamson vs. Hall, 405.

11. *Conveyances—Incumbrances, covenant against—Knowledge of, effect of.*—A knowledge of the existence of the incumbrance by the covenantee at the time the covenant is entered into, will not relieve the covenantor from his liability on the covenant.—Id.

12. *Damages—Incumbrances, covenant against—How measured.*—Where the incumbrance on land is a railroad passing over it, the damages for this breach of the covenant against incumbrances are the value of the land as increased or diminished by special damages or benefits resulting therefrom.—Id.

13. *Conveyance—Construction of—"More or less."*—The words "more or less" when used in a deed in connection with a description of land by the sectional sub-divisions, or by metes and bounds, are used to designate approximately the quantity of land in such sub-division or defined boundaries, and do not refer to the state of the title to such land.—Id.

14. *Conveyances—Covenant against incumbrances, to whom survives—Administrator.*—A covenant against incumbrances in a conveyance is personal, and an action thereon may be brought by the administrator.—Kellogg v. Malin, 429.

15. *Evidence—Incumbrances, covenant against—Right of way—Object in purchasing.*—Evidence of plaintiff's object in purchasing is inadmissible in a suit for damages on the covenant against incumbrances on account of the existence of a right of way.—Id.

16. *Evidence—Incumbrances, covenant against—Right of way, benefit therefrom.*—In a suit for breach of covenant against incumbrances by reason of a right of way by a railroad, evidence of the enhanced value of the land by reason of the railroad, or of privileges accorded by the railroad, is inadmissible.—Id.

CONVEYANCES, continued.

17. *Contracts—Incumbrances, covenant against—Breach of—Damages, measure of.*—In a suit for breach of covenant against incumbrances, if the incumbrance has inflicted no actual injury on the plaintiff, and he has paid nothing towards removing or extinguishing it, he can recover only nominal damages; if he has removed and paid it off, he can recover what he paid for that purpose, if it be a reasonable and fair price; if he has sustained actual injury, the damages are to be proportioned to the actual loss sustained, and if it be of such a character that it cannot be extinguished, as an easement or servitude, the damages are to be estimated according to the injury arising from its continuance.—Id.

18. *Contracts—Incumbrances, covenant against—Easement perpetual—Occupancy of part by privilege—Damage, measure of.*—A party having a perpetual easement allowed the owner of the servient estate to occupy a part of the land covered by the easement. In a suit by this owner against his grantor for breach of covenant against incumbrances by reason of this easement; *held*, that this occupancy was a question only between the holders of the dominant and servient estates, and was a privilege which might be revoked at any time, and that the fact, that the easement was perpetual, was rightfully taken into consideration in assessing the damages.—Id.

19. *Conveyances—Quit-claim—What title acquired.*—A purchaser by quit-claim obtains just such title as the vendor had, and the land in his hands remains subject to the equities attaching to it in the hands of the vendor, though they may be unknown to the purchaser.—Mann vs. Best, 491.

20. *Conveyances—Title to one and money paid by another—Evidence necessary to set aside.*—Land was conveyed to A. in consideration of a negro, which had been the property of A., but was alleged to have been given by him to B. *Held*, that the evidence leaving the fact of the gift uncertain, the deed would not be set aside.—Atkins vs. Hulse and Brown, 577.

See Execution, 1; Fraudulent Conveyance; Mortgages and Deeds of Trust; Revenue, 3; Sheriffs' Sales, 4, 5.

CORPORATIONS.

1. *Bond—Admission of corporate capacity of obligee, what acts amount to.*—The obligors on a bond given to a corporation, by making and signing the instrument, admit the corporate capacity of the obligee and in suit on the bond cannot plead *nul tiel* corporation.—City of St. Louis vs. Shields, 247.

2. *Corporation acting under color of law—Corporate character, how questioned.*—If a corporation be acting under color of law, and be recognized as such by the State, its corporate character cannot be questioned collaterally. Such a a question should be raised by *quo warranto*. And the rule prevails even though its incorporation may be affected by constitutional provisions.—Id.

3. *Corporations—Grant of powers must be strictly pursued.*—Corporations have only such powers as are specially given by their charters, or are necessary to carry into effect some specified power; and the mode of procedure prescribed by the terms of the grant must be strictly pursued. Any other exercise of powers is *ultra vires*.—Matthews vs. Skinker et al., 329.

See Banks and Banking, 1; Corporation, Municipal; Corporation, Religious; Counties; Jurisdiction, 1; North Missouri Railroad.

CORPORATIONS, MUNICIPAL; See Bills and Notes, 13; Chillicothe, City of; Constitution of Missouri, 2, 3; Counties; Saint Louis, City of.

CORPORATIONS, RELIGIOUS.

1. *Corporations, religious—Christian Church—Incorporation—Majority vote—Contest for assets—Fund on deposit, suit for, how brought—Power of corporation to hold property, etc.*—According to the rules of the "Christian" Church, a majority of those voting at any regular meeting of any church organization governed in secular affairs; and such a majority voted in favor of the incorporation of one of them, but a minority refused to co-operate in its action. The petition for incorporation was accompanied by a list of the members, as furnished by the clerk from the church rolls. Shortly after the incorporation the former treasurer delivered to the new treasurer all the books, papers, records and assets previously held by him, among which was a certificate of deposit of the old church fund, which had been placed by him in bank. It appeared that after the incorporation the church continued to worship in the same building, and under the same pastor as before, and was recognized as the same body, and that the minority seceded from it. In suit by the incorporated church against the bank for the fund on deposit, the ex-treasurer and minority interpleaded for it, claiming to be the original church, and as such entitled to all its assets. It was held, 1st, that the action of the majority was binding on the whole body of church members, and that the incorporation, conformably thereto, operated as a transfer of the rights and interests of the individual members of the corporation so created; 2nd, that presumptively the list furnished by the church showed its membership; 3d, that it was unnecessary for the incorporation, that all the members should sign the petition; but that only those—not less than three in number—applying were required to do so, and that the provision of the statute (Wagn. Stat. 1872, p. 339, § 2) was for the purpose merely of ascertaining who composed the corporation; 4th, that the action of the ex-treasurer in turning over the records, papers, etc., was an express admission that the fund belonged to the church in its corporate capacity; 5th, that the suit was properly brought in the name of the corporation, instead of that of the trustees; 6th, that a claim of the minority, that under the constitution the plaintiff could not hold the property, could not be collaterally considered in such a proceeding; 7th, that under the facts of the case plaintiff was entitled to the fund.—North St. Louis Christian Church vs. McGowan et al, 279.

COTTON, TAX ON; See Sales, 3.

COUNTIES.

1. *Counties—Liability for injuries while engaged in enterprises of a peculiar and local character—Measure of liability as compared with municipalities and individuals.*—The rule that counties, being political sub-divisions of the State, are not liable for the laches or misconduct of their servants, has no application to a neglect of those obligations incurred by counties when special duties are imposed on them. Thus, where the county of St. Louis made a contract for laying water-pipe to the county Insane Asylum, the work being done under the supervision of the county engineer, and, while a trench was being dug in the grounds of the asylum, it caved in and killed one of the workmen, it was held that the duty in which the county was engaged was not one imposed by general law upon all counties, but a self-imposed one; that *quoad hoc* the county was a private corporation, engaged in a private enterprise (more especially as

COUNTIES, continued.

the work was being done on its own property), and governed by the same rules as to its liability. In such case it is immaterial, whether the performance of the work is voluntarily assumed in the first instance, or is a special duty imposed by the legislature, and assented to by the county. And municipal and *quasi* corporations are subject to the same doctrine of liability.—Hannon, et al. vs. St. Louis Co., et al., 313.

See Court, County.

COURT, COUNTY.

1. *County Courts—Sheriffs, settlements with—Conclusiveness of.*—County courts in settling with sheriffs act only as the fiscal agents of the county, and such settlements are not conclusive, but are open to the correction of any mistakes. (Marion Co. vs. Phillips, 45 Mo., 75.)—State to use, etc., vs. Roberts, et al., 388.
2. *Evidence—Sheriffs, suit on bonds of—Settlements—Confusion.*—A sheriff was authorized to sell county swamp lands, and was authorized to take in payment cash, notes for deferred payments, and the county railroad bonds. In the synopsis of his settlement made from the accounts kept by the clerk of the county court, he was apparently charged with a gross sum for everything received, without distinguishing between the cash notes or bonds. *Held,* that with no other evidence than that synopsis, no judgment could be rendered against the defendants in a suit on the sheriff's bond.—Id.

See Election, 1; Mortgages and Deeds of Trust, 16.

COURT, PROBATE; See Administration.

COURTS; See St. Louis Circuit Court; St. Louis Court of Appeals.

COURT, UNITED STATES; See Jurisdiction, 1, 2, 3, 4.

COVENANT; See Conveyances, 10, 11, 12, 13, 14, 15, 16, 17, 18.

CRIMES AND PUNISHMENTS; See Practice, criminal, 18, 20.

CRIMINAL LAW; See Practice, criminal.

CURTESY; See Husband and Wife, 3, 4, 5.

CUSTOM.

1. *Custom—What essential to constitute, when will control—Cannot change the law.*—A custom, in order to control, must be certain, settled and uniform, and not of a character such as to alter the rights and liabilities of parties as fixed by law. Custom cannot change or do away with the requirements of law touching the delivery of personal property.—Ober vs. Carson's Ex'r, 209.

D.

DAMAGES.

1. *Damages—Risks incident to employment, master not responsible for.*—A master is not responsible for injuries happening to his servant from the usual and ordinary risks incident to the employment in which he is engaged. In all such cases the contract is presumed to be made with reference to those risks. Conroy vs. Vulcan Iron Works, 35.
2. *Damages—Instrumentalities used by servant—When glaringly dangerous he cannot recover—Rule where they may be used with great caution different—Question of caution for jury, when.*—Where the instrumentality which the servant is required to perform service with is so glaringly and palpably dangerous that a man of common prudence would not use it, and with the utmost care and skill danger is still imminent, the master cannot be held responsible for the damage

DAMAGES, continued.

resulting therefrom, although the servant may have notified him of the danger, and he may have promised to repair it. But where the machinery and appliances though dangerous, are not of such a character that they may not reasonably be used by the exercise of skill and diligence, and the proper circumspection is employed, the rule is different. And whether he exercises the caution requisite under the circumstances, is a question for the jury.—Id.

3. *Damages—Negligence—Giving way of plank at coal hoist—Notification to company of danger—Promise of repair—Rule as to liability.*—Where boards placed between the rails of an inclined tramway on which cars ran at a "coal hoist," being insecurely fastened, gave way under a servant of the company owning the same, while he was engaged in the line of his employment in detaching one of the cars while in motion from a wire rope, and he was in consequence run over and injured, it appeared that he had discovered the condition of the track two or three days before, and reported the same to his superior officer, but was assured that he would "make the proper repairs," but could "not do everything at once." It also appears that the timbers had been used and were still being used at the time of the casualty. *Held*, that the servant had a right to presume that the company would take proper steps to secure his safety, and that the company was responsible.—Id.

4. *Damages—Falling of building—Superintendent, responsibility of for acts of another done with his approval—Misfeasance and non-feasance—Amended petition—Change in cause of action—Statute of limitations.*—One having the general charge and superintendence of the construction of a building was held to be responsible for the killing of a workman caused by the falling of a wall which resulted from the giving way of supports on which it rested, under the working of a jackscrew, although the appliance was put to work under the immediate direction of another person employed by the owner of the building, and while the architect was absent, where it appeared that the manager of the jackscrew was employed under the advice of the architect, and subject to his direction, and that he knew and approved of the method adopted for effecting the raising. Whether the wall fell because the plan for raising it was a bad one, or because the supports were inadequate, in either case the disaster was attributable to positive misfeasance for negligence in a work which the architect undertook, but in which he failed to exhibit the care and skill which the law imposed upon him. For such negligence he was responsible not merely to his employer, but to those injured in consequence, and the question whether, and in what respect, he was guilty of negligence, was one for the jury under appropriate instructions. The doctrine that agents are not responsible to third persons for mere non-feasance, has no application to such a case.

In such suit, where the original petition joined the architect and the owner as defendants, charging them with carelessness and negligence in the construction of the building, and the suit was subsequently dismissed as to the owners, and an amended petition was filed alleging that the remaining defendant (the architect) had the entire superintendence and control of the building, and that the disaster was caused by his carelessness as such architect, in the construction of the building, it was held that the amendment did not change plaintiff's cause of action so as to affect the running of the statute of limitations.—Lottman vs. Barnett, 159.

DAMAGES, continued.

5. *Damages—Obvious and covert danger—Risks assumed by servant.*—It is the duty of the master, where his servant is engaged in hazardous employments, to see that every reasonable precaution on his part, to insure safety, is observed. If the risk is perfectly obvious to the sense of any man, whether servant or master, the servant assumes the risk. But where such is not the case, and it is fair to presume, that the employee has been guilty of no negligence, the rule is otherwise.—Keegan vs. Kavanaugh, 230.

6. *Damages—Falling in of embankment—Re-assurance of employee—Confidence in master—Measure of liability—Negligence.*—Where a hod carrier engaged at work in an excavation, having manifested some reluctance to descend, was ordered by his employer to go down, and the earth caved in upon and killed him, *held*, that the order was an implied assurance that there was no danger; that the laborer properly relied on the superior information of the master, and that the latter was liable; that in such case the question of negligence was for the jury.—Id.

7. *Damages—Fall from scaffold—Ill construction—Superintendent—Co-employees.*—A superintendent, placed in charge of work, is not a fellow servant with the employees, but the agent of the master and a vice principal, and not within the rule as to the non-liability of the master for negligence of a co-employee. And where, by the defectiveness or ill construction of a scaffold built by the superintendent or under his directions and necessary for the work in which he was engaged, an employee receives a fall and injuries, and the superintendent is guilty of negligence in preparing the scaffold, and if the servant exercised proper care, the master will be liable.—Whalen vs. Centenary Church of St. Louis, 326.

8. *Defective appliances—Incompetent co-employee.*—Where the master employs incompetent servants or defective machinery, the risks arising from either of these circumstances are not implied by the contract of the servant.—Id.

9. *Master and servant—Care in providing appliances.*—To provide a safe place where the servant can work is an obvious duty of the employer.—Id.

10. *Master and servant—Care as to appliances.*—A master is bound to exercise proper care in the materials and machinery given to a servant to work upon, or with, and if this duty is neglected, he is liable for resulting injuries.—Id.

11. *Instruction—Vindictive Damages—Evidence.*—An instruction awarding vindictive damages, without evidence to warrant it, is improper.—Id.

12. *Practice, civil—Trials—Instructions—Plaintiff's condition—Contributory negligence*—In suit for damages sustained in stepping off a car, the plaintiff then suffering from a prior injury, an instruction to find for the plaintiff if the jury find that the conductor refused to stop the car where asked, and that the plaintiff carefully, and without negligence, stepped off, is erroneous, because the plaintiff's condition at the time is ignored, and the contributory negligence is left to the jury to find as a matter of fact, without any explanation of what would, on the evidence, constitute such contributory negligence. And an instruction to the jury, that if satisfied the car was moving faster than usual when the plaintiff got off, and that plaintiff knew the risk and danger, and was not influenced by the remark of the conductor to jump, this was evidence of a want of care, was objectionable, in not referring to plaintiff's wound, and in not directing

DAMAGES, continued.

the attention of the jury to facts, which, if satisfactorily proved, would, in the estimation of the court, constitute negligence; but it simply declares certain facts evidence of negligence, when the facts did not of themselves constitute negligence.—Wyatt vs. The Citizens' Rly. Co., 408.

13. *Master and servant—Injury—Fellow-laborer, incompetency of—When master liable.*—A master is not liable for damages to his servant, occasioned by negligence or unskilfulness of a fellow-servant, unless there be evidence tending to show that the master, or his agent, in selecting the servant had reason to know of such incompetency, or failed to make such inquiries as prudence required when he was employed, or retained him after his incompetency or unfitness had become obvious.—Lee vs. Detroit Bridge and Iron Works, 565.

14. *Master and servant—Injury—Fellow-servant, incompetency of—Negligence, one act of—Evidence.*—One single act of negligence by a servant does not by itself have any tendency to establish general incompetency.—Id.

15. *Damages—Act of God—Concurring negligence.*—The latest decisions of this court incline to the opinion, that where the negligence of the defendant concurs in and contributes to the injury, he is not exempt from liability on the ground that the immediate damage is occasioned by the act of God or inevitable accident.—Pruitt vs. H. & St. Jo. R. R. Co., 527.

See Bills and Notes, 8; Common Carriers, 7, 8, 9, 10; Conveyances, 12, 15, 16, 17, 18; Evidence, 12; Exclusive rights, 1; Railroads, 2.

DEATH OF PARTY; See Practice, civil, 1, 2.

DEATH, PRESUMPTION OF; See Evidence, 1, 2, 3, 4, 7, 8, 9.

DECISIONS; See Limitations, 8; Peddler, 1.

DELEGATION OF POWER; See Stock Law, 1, 2.

DESCENTS AND DISTRIBUTIONS; See Land and Land Title, 4.

DESCRIPTION; See Conveyances, 13.

DIVORCE.

1. *Divorce—Decree on cross-bill in plaintiff's absence.*—In an action for divorce, where defendant files his cross-bill, and the case is called for trial in the absence of plaintiff, under the present practice (Wagn. Stat., 1041, § 16; Id., 533-4, § 3) the court may dismiss plaintiff's bill and proceed at the same time to hear testimony and award a divorce on the cross-bill. (Nordmanser vs. Hitchcock, 40 Mo., 182, commented on.)—Ficke v. Ficke, 335.

DOWER.

1. *Administration—Mortgage—Sale by administrator—Subrogation—Dower.*—A widow sued for dower in land sold by the administrator of her husband, out of the proceeds of which sale a judgment on a mortgage by husband and wife was satisfied, and the purchaser claimed that he should be subrogated to the rights of the mortgagee. *Held,* that the purchaser could not be subrogated. (Jones vs. Bragg, 33 Mo., 337.)—Sweaney v. Mallory, 485.

2. *Estoppel—Dower—Sale of land by administrator—Assent of widow.*—Where an administrator sells land, representing it to be free of incumbrances, and the widow being present assents to this statement, and states that it will be sold free of her claim of dower, she is estopped from subsequently claiming dower in the land sold.—Id.

See Mortgages and Deeds of Trust, 15.

E.

EASEMENT; See Conveyances, 12, 15, 16, 17, 18.
EJECTMENT; See Jurisdiction, 6; Practice, civil—Pleading, 16, 17.
ELECTION.
1. *Elections, contest over—County courts, judges of—Notice of contest, what requisite in—Statute, construction of.*—In a notice of the contest of the election of a judge of the county court (Wagn. Stat., 573, § 34), it is sufficient if the notice conforms to the statute, and it is not necessary to state the contestant's eligibility, nor that the result would have been different, if the irregularities had not occurred.—Ledbetter vs. Hall, 422.
2. *Elections—Ballot, numbering of—Statute, construction of.*—If the judges of election do not cause to be placed on each ballot the number corresponding to the number of the voter offering it, it cannot be counted. (Wagn. Stat., 566, 567, § 15.)—Id.
See Stock Law, 1.
EMBEZZLEMENT; See Practice, criminal, 6, 9, 10.
EMINENT DOMAIN.
1. *Eminent domain—Right of owner to full compensation regardless of benefits.*—Hough, Judge, expressed the opinion that where private property is taken for public use, the owner should receive its full value without regard to the benefits supposed to be conferred upon that portion of his property which is not taken.—State ex rel., etc. v. City of St. Louis, 244.
2. *Eminent domain—Condemnation of land for railroads—Exceptions to report of commissioners.*—Where land, taken for railroad purposes, is appraised by commissioners, it is the duty of the circuit court, on exceptions filed, to hear testimony, if offered, as to the adequacy of the compensation awarded. And where such testimony is presented, the refusal of the lower court to consider it will work a reversal of the cause.—St. L. & Flor. Rly. v. Almeroth, 343.
See Jurisdiction, 10, 12, 13
EQUITY.
1. *Equity—Specific performance—Action to vest title—Parol promise to leave property in consideration of personal attentions, proof of, what sufficient.*—In suit in equity, brought by the niece against the heirs of her deceased aunt, to vest in the former the title to certain lands owned by the latter at the time of her death, it appeared that the aunt had written to the guardian of the niece, promising that if she would come and live with her, and nurse and take care of her, for the remainder of her days, then all her property should, at her death, be her niece's; and it appeared that the guardian assented to the arrangement, and that it was faithfully carried out by his ward, and that meanwhile the promise of the aunt was frequently reiterated. *Held*, 1st, and generally, that equity would sustain an action of that description; 2d, that such promises, although not clothed in technical and precise terms, would be sufficient if no doubt remained as to the intention; 3d, that the contents of the letter might be shown by testimony derived from recollection, its non-production being sufficiently accounted for, and its authorship might be shown by proof of general familiarity with the handwriting; 4th, that the promise need not be in writing, but would be sufficient if made orally; 5th, that a failure to specify the mode of carrying it out, or the property intended to be be-

EQUITY, continued.

queathed, would not impair its binding force; 6th, that the agreement having been acquiesced in and carried out by the niece, after her majority, no more formal assent thereto on her part than that given by her guardian was necessary.—Sutton v. Hayden, 101.

2. *Trustee of married woman—Joinder of co-defendant in suit to divest her title.*—One who is appointed trustee for a married woman's estate, in suit to divest her title, must, if the legal title be vested in him, and should as a matter of precaution at all events, be joined as co-defendant.—Id.

3. *Equity—Conveyance—Undue Influence.—Fiduciary relations—Burden of proof.*—In suit to set aside a conveyance on the ground of fraud and undue influence, where the evidence shows the existence of confidential relations as well as those of principal and agent between the grantor and grantee, the burden is upon the latter, and all claiming through him, except purchasers or encumbrancers for a valuable consideration without notice, to show that absolute fairness, adequacy and equity characterized the transaction.—Street v. Goss, 226.

4. *Equity—What estates vendible in execution.*—Under the present statute (Wagn. Stat., 605, § 16; see also Morgan v. Bouse, 53 Mo. 219) the owner of land, the legal title to which has been procured through fraud, etc., has an estate therein which is vendible in execution.—Id.

5. *Equity—Bill to set aside deed on account of fraud—Equity of redemption, purchase of at execution sale.*—In proceedings to declare a conveyance a mortgage, and for permission to redeem, a purchaser of an equity of redemption, at execution sale, was held to occupy as substantial a footing as though he had purchased at a private sale.—Matson v. Capelle, 235.

6. *Marital conveyances—Undue influence, what not.*—Where property is accumulated in a great degree by the superior intelligence and active energies of the wife, and being thereto induced by his confidence in her, the husband makes to her a deed of his property, and it appears that the wife's influence, though great, was salutary and wholesome, and not exerted for fraudulent or selfish considerations, the deed will not be set aside on the ground of "undue influence," such as the law forbids. And it is immaterial as touching the legal rights of the parties in such case, that the confidence of the husband may have been misplaced.—Hollocher v. Hollocher, 267.

7. *Deeds—Consideration clause—Parol evidence varying and contradicting, when proper.*—The consideration clause in a deed is always open to explanation or contradiction; certainly so, except as between the parties or their privies, where plaintiff seeks to set aside his own deed for lack of a consideration therein expressed to have been paid; and so bases his action on his own fraud; and subject to the exception, that the consideration clause, for the purpose of giving effect to the operative words of a deed, may be regarded as conclusive.—Id.

8. *Conveyance—Consideration expressed in deed—Impeachment of.*—Where suit is brought by the maker to set aside a deed on the ground that no consideration whatever passed, and that the same was obtained by fraud and undue influence, plaintiff cannot insist, that the consideration, expressed in the deed, was unconscionable, and cannot be attacked by parol evidence.—Id.

EQUITY, continued.

9. *Equity—Bill to set aside mortgage of wife's separate estate—Undue influence by husband, etc.*—Where, by the terms of a deed vesting a separate estate in the wife, the husband was made her trustee and specifically required to protect the estate against his debts, and it appeared that, being then indebted and embarrassed in his business, in conjunction with his creditors he endeavored to persuade his wife to sign a mortgage of said property for his relief; that after manifesting great unwillingness, and after repeated solicitations and pressure amounting almost to moral co-ercion, she was finally prevailed on to sign the deed. *Held*, that such proof would warrant a decree setting aside the mortgage.—Sharp v. McPike, 300.

10. *Equity—Injunction—Judgments, fraudulently assigned.*—A. alleged and proved, that a judgment was obtained against B., himself and another as sureties on B.'s bond; that B. was heavily indebted and that proceedings in bankruptcy were begun against B., but they were dismissed on the agreement of C., a creditor of B., with the judgment creditor and A. to pay the judgment, having it assigned to him, and only to enforce it against B.; that the judgment was assigned to C., who ordered the sheriff to return the executions unsatisfied; that then the judgment could have been made out of B.; that C. caused B.'s property to be attached for his other claims and certain other debts; and subsequently assigned the judgment to other parties, who knew all the facts; that executions were then issued on the judgments; that B. and the other surety had become insolvent. *Held*, that A. was entitled to an injunction to restrain the sale of his property under that execution.—Biggerstaff vs. Hoyt, 481.

11. *Equity—Evidence—Oral testimony—Suspicious circumstances—Supreme Court.*—Where in an equity case the respondent's testimony was direct and positive, and well sustained all his material averments, while the appellants' testimony was not so satisfactory, and their actions were surrounded by suspicious circumstances and strongly tended to corroborate respondent's allegations, and most of the testimony was oral, this court will not disturb the finding.—Id.

See Attachment, 5; Bills and Notes, 10, 12; Conveyances, 1, 19; Husband and Wife, 10; Jurisdiction, 6; Limitations, 17, 18; Mortgages and Deeds of Trust, 1, 4, 5; Reference, 3; Sheriff's Sales, 3.

ESTOPPEL; See Agency, 1, Dower, 2.

EVIDENCE.

1. *Evidence—Absence for seven years—Presumption as to time of death.*—Where one has been absent and unheard of for seven years, the presumption arises that he is then dead, but not, that he died at any particular time theretofore. To raise the latter presumption, special facts and circumstances should be shown, reasonably conducing to that end. The evidence need not be direct nor positive; but it should be of such a character as to make it more probable that he died at a particular time, than that he survived.—Hancock, Adm'r, vs. Amer. Life Ins. Co., 26.

2. *Evidence—Life, presumption as to continuance of.*—When one is known to be alive at a certain time, there is a presumption of the continuance of his life after that period which must be overcome by some sort of proof.—Id.

EVIDENCE, continued.

3. *Evidence—Sudden disappearance, etc.—Inference as to death.*—Where one studious in habits, attentive to business, with a fixed and permanent residence and pleasant domestic relations, suddenly disappears, these facts may warrant a jury in finding his death at the time.—Id.

4. *Evidence—Insurance—Disappearance of assured, circumstances attending—Presumption as to death arising from.*—In suit brought about the year 1871, on a policy of life insurance, wherein the company put in issue the death of the assured and set up the forfeiture of his policy by failure to pay a premium note which had matured June 8th, 1861, it appeared in evidence that the assured was unmarried and without a fixed place of abode; that he disappeared about March 1st, 1861, from his boarding place at New York, with the declared intention of going to Brooklyn, and did not return; that he left behind clothes and a valise of no great value; that prior to his disappearance he had been in the habit of writing to his friends and relatives, but was not heard of afterward; that he had lived for years in different states of the south, and had announced his intention of going thither to take up arms in her defense, and expressed on the other hand no design of making his residence in New York. *Held*, that under such state of facts, although the assured had been unheard of for more than seven years, the proof was insufficient to raise a presumption of the death of the assured prior to the maturity of the note, and the company could not be held.—Id.

5. *Promissory note—Suit on—Interest clause, insertion of—Proof as to other notes, etc.*—It is not competent, in order to show that a party to a note in suit, has authorized the insertion of a clause respecting interest, to show that he was a party to other notes containing similar clauses.—Iron Mountain Bk. vs. Murdock, 70.

6. *Evidence—Impertinent matter—Testimony as to—Impeachment of witness.*—A witness cannot be questioned in regard to impertinent matter in order to contradict him.—Id.

7. *Administration—Granting of letters prima facie proof of death.*—In suit by an administrator on a policy of life insurance taken out by deceased, where defendant admits plaintiff's appointment, but merely denies its legality, and the proof shows annual settlements made by him, it will be presumed that letters were granted. And the granting of the letters is *prima facie* evidence of the death of the intestate. But such presumption is of the weakest and most inconclusive character, and the very slightest evidence will be sufficient to overcome it.—Lancaster, Adm'r, vs. Washington Life Ins. Co. of N. Y., 121.

8. *Life insurance—Disappearance—Presumption as to fact and time of death.*—Where, when last heard from, one was in contact with some specific peril, this circumstance may raise a presumption of death without regard to the duration of the absence. But other circumstances may create the same presumption, as where the circumstances of the disappearance are more consistent with the theory of death than that of a continuance of life, when considered with reference to those influences and motives which ordinarily govern men; in either of which cases the jury may infer death at any time, within the seven years, such as may seem to them most probable.—Id.

EVIDENCE, continued.

9. *Life insurance—Disappearance on steamer—Case stated raising presumption of accidental drowning.*—In suit on a life insurance policy, it appeared that the assured who was an unmarried man of about forty years of age, took passage on a lake steamer bound for Buffalo; that on the voyage he seemed to be sick and despondent; that while the vessel was in Lake Huron, he was seen in the evening on the guard, and leaning out through a "shutter" in the bulwark of the boat, which opened upon the water; that on landing at Buffalo, ineffectual search was made for him, but in his stateroom were found his coat, hat and valise; that the vessel stopped at way posts, but he was not seen to go ashore, and could not have landed unobserved. *Held*, that the testimony was amply sufficient to show that he was brought in contact with a specific peril, and to raise the presumption of his death by drowning; and that such state of facts also raised the presumption that his death was the result of accident.—Id.

10. *Evidence—Record, insertion of, in pleadings—Introduction in evidence.*—The rule is well settled, that where a record is admissible for any purpose, it may be inserted in the pleadings, or it may be introduced in evidence with the same effect.—Strong vs. Phœnix Ins. Co., 289.

11. *Insurance, marine—Sinking of boat at port—Unseaworthiness.*—The sinking of a boat at port raises a violent presumption of unseaworthiness, and this is always a defense to suit for such loss.—Gartside vs. Orphans' Benefit Ins. Co., 322.

12. *Evidence—Agents, statements of.*—A statement by an agent of a railroad, that it was reported that there had been a delay in a freight train, and that, if the facts were as represented, the company ought to and would pay the damages, and requesting the party in interest to investigate the facts, is incompetent, and irrelevant in a suit against the road for damages from such delay.—Tuggle vs. St. L., K. C. & N. R. R. Co., 425.

13. *Practice, civil—Supreme Court—Illegal testimony—When will reverse.*—Where the evidence is conflicting, and illegal testimony is admitted, which might mislead a jury, the court might be required to send the case back for a new trial; but where there is no conflicting evidence, indeed no testimony for the appellant, it is more in accordance with the provisions of the statute (Wagn. Stat., 1067, § 33), to let the judgment stand.—Id.

14. *Equity—Evidence—Oral testimony—Suspicious circumstances—Supreme Court.*—Where in an equity case the respondent's testimony was direct and positive, and well sustained all his material averments, while the appellants' testimony was not so satisfactory, and their actions were surrounded by suspicious circumstances and strongly tended to corroborate respondent's allegations, and most of the testimony was oral, this court will not disturb the finding.—Biggerstaff vs. Hoyt, 481.

See Admissions; Agency, 1, 3, 4; Bills and Notes, 1, 3, 4, 5; Bond, 1; Conveyances, 8, 20; Court, County, 2; Custom, 1; Damages, 13, 14; Equity, 1, 7, 8, 11; Good Will, 2; Insurance, Fire, 6, 7; Insurance, Marine, 1; Judgment, 6; Malicious Attachment, 1; Mortgages and Deeds of Trust, 1, 17; Practice, civil—Trials, 1, 2, 5, 6, 7, 11; Practice, criminal, 18, 20; Practice, Supreme Court, 2, 3, 5; Railroads, 4, 5; Reference, 1, 2; Witnesses.

EXCLUSIVE RIGHT.

1. *Exclusive right to manufacture articles—Infringement on—Measure of damages.*—Where defendant has infringed on plaintiff's exclusive right to manufacture and sell certain articles, on a proper case presented he will be entitled to all the profits made by defendant therefrom, regardless of the question whether plaintiff's business has been interfered with, or his profits affected thereby.—Peltz vs. Eichele, 171.

2. *Good will—Violation of covenant of—Diversion of trade—Measure of damages—Evidence, what proper.*—Where in an action for violating a covenant not to manufacture a certain article, plaintiff merely charges that defendant has diverted plaintiff's patronage to himself, and thereby injured or destroyed the good will of plaintiff's business, without alleging any claim to the profits made by defendant on articles, the exclusive right to manufacture which belonged to plaintiff, or to the profits derived from the use of a trade mark, the exclusive right to which was in plaintiff, his measure of damages is not what defendant has gained, but what he has lost by the breach, whether defendant's profits have been greater or less than that amount. And in ascertaining plaintiff's losses, defendant's profits may be given in evidence in connection with the diversion of customers from plaintiff to defendant, and the amount of plaintiff's purchases and manufactures and sales, and any reduction in the price of articles sold in consequence of the unlawful competition.—Id.

EXECUTION.

1. *Sheriff's deed—Recitals—Transcript from justice—Execution and return nulla bona.*—In a sheriff's deed on an execution issued on a transcript from a justice, it is not necessary to recite that an execution was issued by the justice and returned *nulla bona.* (Carpenter vs. King, 42 Mo., 224.)—Perkins vs. Quigley, 498.

2. *Officers, public—Clerk of circuit court—Acts, presumption in favor of validity of—Execution issued on transcript.*—The clerk of the circuit court being prohibited from issuing an execution on a transcript from a justice, till an execution has been issued by the justice and returned *nulla bona, semble,* that it will be presumed when the clerk issues an execution, that such prior execution has been issued and returned *nulla bona.*—Id.

See Attachment, 3; Equity, 4, 5; Fraudulent Conveyances, 2; Homestead, 1; Judgment, 9; Justices' Courts, 1, 3; Practice—Supreme Court, 8; Sheriff's Sales, 5; Unlawful Detainer, 1.

F.

FILING INSTRUMENT WITH PLEADING; See Practice, civil—Pleading, 19.

FIXTURES; See Mechanics' Liens, 2.

FRAUD; See Administration, 9, 10; Bills and Notes, 2, 3, 5, 6, 7; Contracts, 2; Equity, 5, 10, 11; Judgment, 4, 5; Mortgages and Deeds of Trust, 18; Practice, civil—Pleading, 12.

FRAUDS, STATUTE OF

1. *Statute of frauds—Mortgages—Tacking verbal agreement by mortgagee as to subsequent advances.*—A verbal agreement that subsequent advances shall constitute a lien on land already conveyed as a security for former loans, is within the statute of frauds and void.—O'Neill v. Capelle, 202.

FRAUDULENT CONVEYANCES.

1. *Fraudulent conveyances—Deed to wife—Embarrassed debtor.*—A deed to his wife made by a man, who at the time is largely indebted or in greatly embarrassed circumstances, will be set aside in favor of his creditors.—Stivers vs. Horne, 473.

2. *Conveyances—Quit-claim—Innocent purchaser—Execution sale—Deed, suit to set aside.*—In a suit to set aside a deed for fraud by a purchaser of the grantor's interest at an execution sale, one, who purchased by quit-claim deed (Ridgeway vs. Holliday, 59 Mo., 444) several months after the execution sale, cannot claim to be a purchaser without notice.—Id.

3. *Homesteads—Debts anterior to acquisition of.*—A claim of homestead exemption will not avail against debts created prior to the acquisition of the land sued for. (Farra vs. Quigly, 57 Mo., 284.)—Id.

See Mortgages and Deeds of Trust, 19, 20, 21.

G.

GARNISHMENT.

1. *Garnishment—Return of officer—Attachment—"In hands" of defendant.*—The return of an officer on a summons of garnishment, that he summoned the garnishee * * to answer touching his indebtedness to defendant, is insufficient to give the court jurisdiction. The return should show that the officer had attached the property or evidences of debt "in his hands." (Wagn. Stat., p. 186, § 23, subd. iv., and see also ibid, 666, § 13.) And for an omission so to state the garnishment may be quashed on motion. Pending such motion, however, the officer may amend his return in accordance with the facts.—Norvell vs. Porter, 309.

See Attachment, 1, 2, 3, 4, 5.

GENERAL ASSEMBLY; See Legislature.

GOOD WILL.

1. *Good will—Labels and wrappers—Protection, what afforded.*—The good will of a business, as embodied in labels and wrappers bearing the name of the concern, or other brands or marks, will be protected on principles analagous to those applied in cases of infringement of trade marks.—Peltz vs. Eichele, 171.

2. *Good will—Violation of covenant of—Diversion of trade—Measure of damages—Evidence, what proper.*—Where in an action for violating a covenant not to manufacture a certain article, plaintiff merely charges that defendant has diverted plaintiff's patronage to himself, and thereby injured or destroyed the good will of plaintiff's business, without alleging any claim to the profits made by defendant on articles, the exclusive right to manufacture which belonged to plaintiff, or to the profits derived from the use of a trade mark, the exclusive right to which was in plaintiff, his measure of damages is not what defendant has gained, but what he has lost by the breach, whether defendant's profits have been greater or less than that amount. And in ascertaining plaintiff's losses, defendant's profits may be given in evidence in connection with the diversion of customers from plaintiff to defendant, and the amount of plaintiff's purchases and manufactures and sales, and any reduction in the price of articles sold in consequence of the unlawful competition.—Id.

GRAIN; See Sales, 4.

GUARDIAN AND WARD; See Administration, 9, 10.

H.

HOMESTEAD.

1. *Homesteads—What constitutes—Contiguity of land—Statute, construction of.* The only restrictions concerning homesteads in the statute (Wagn. Stat., 697, § 1), relate to the quantity and value of the land, and the parcels of land composing it need not be contiguous, provided they are used in connection with each other.—Perkins v. Quigley, 498.

See Fraudulent Conveyances, 3.

HUSBAND AND WIFE.

1. *Statute of limitations—Disability of married women—Land descended or accrued to wife—Disseizin of—Statute begins to run as against wife, when.*—Where a title descends or accrues to a married woman, she has not a mere reversionary interest in the land consequent upon her husband's death, and a disability as to such estate till that event. During coverture the husband is not a tenant, by the curtesy, but is only seized in the right of the wife. Their seizin is joint, and the statute of limitations (Wagn. Stat., 916, § 4) will begin to run against her from the joint disseizin of both. And if she fail to sue within twenty-four years after such disseizin, her right of action is barred, The fact that the husband has the power during coverture to create a particular estate, either *jure mariti*, or as tenant by the curtesy initiate, without his wife's joinder, and thus terminate her estate, has not under the above statute the effect of making her interest merely reversionary.—Valle v. Obenhause, 81.
2. *Statute of limitation of twenty-four years—Effect of on rights of married women.*—The statute prescribing a limitation of twenty-four years (Wagn. Stat., 916. § 4) was designed to operate uniformly after a certain definite period, as a statute of absolute repose, affecting either infants, femes covert, insane persons, etc.—Per Sherwood, Judge.—Id.
3. *The statute of limitations will not begin to run against a married woman,* on account of a disseizin of her fee simple lands, occurring after the creation in her husband of a tenancy by the curtesy initiate, until the determination of such estate.—Per Hough, Judge, Dissenting.—Id.
4. *During the existence of the husband's estate by the curtesy initiate,* the wife has no right of entry, whether such estate has been conveyed by the husband, or not.—Id.
5. *The estate of a tenant by the curtesy initiate is an estate for his own life* and is held by him in his own right, and not in right of his wife; and such estate can be transferred to an adverse occupant by operation of the statute of limitations, as well as by conveyance, or sale under execution.—Id.
6. *Trustee of married woman—Joinder of co-defendant in suit to divest her title.*—One who is appointed trustee for a married woman's estate, in suit to divest her title, must, if the legal title be vested in him and should as a matter of precaution at all events, be joined as co-defendant.—Sutton v. Hayden, 101.
7. *Separate estate of wife—Acknowledgment—Examination apart from husband.*—Where in a conveyance of land made in trust for the separate use and benefit of a married woman, she is authorized by any written order to direct a conveyance or mortgage, such instrument passes her title although her acknowledgment be not taken "separate and apart" from her husband.—Sharp v. McPike, 300.

HUSBAND AND WIFE, continued.

8. *Equity—Bill to set aside mortgage of wife's separate estate—Undue influence by husband, etc.*—Where, by the terms of a deed vesting a separate estate in the wife, the husband was made her trustee and specifically required to protect the estate against his debts, and it appeared that, being then indebted and embarrassed in his business, in conjunction with his creditors he endeavored to persuade his wife to sign a mortgage of said property for his relief; that after manifesting great unwillingness, and after repeated solicitations and pressure amounting almost to moral co-ercion, she was finally prevailed on to sign the deed. *Held*, that such proof would warrant a decree setting aside the mortgage.—Id.

9. *Married women, note by—Intention to bind separate estate.*—In reference to her separate estate, a married woman is treated as a *feme sole;* and the giving of a note, or making of a written contract, by her, raises the presumption, that she intends to bind such estate. The contrary intention may be shown, but it must appear from the instrument itself, and cannot be shown by parol. —Metropolitan Bk. of St. Louis v. Taylor, 338.

10. *Husband and wife—Personal property, separate estate in, how reached—Attachment—Equity.*—The separate estate of a wife in personal property cannot be reached by attachment proceedings, but only by appropriate proceedings in equity, and then only when she has created a charge on her separate estate binding thereon.—Gage v. Gates, 412.

See Divorce; Dower; Fraudulent Conveyances, 1; Land and Land Titles, 4.

I.

INCUMBRANCES; See Conveyances, 10, 11, 12, 14, 15, 16, 17, 18; Dower, 1, 2; Mechanic's Lien, 2, 3; Mortgages and Deeds of Trust; Sheriffs' Sales, 5.

INDICTMENT; See Practice, criminal, 1, 2, 11, 12, 13, 15, 17.

INDORSEMENT; See Bills and Notes.

INFANTS; See Guardian and Ward.

INJUNCTION; See Banks and Banking; Equity, 10; Revenue, 6.

INSTRUCTIONS; See Damages, 11; Insurance, Fire, 2, 7, 11; Practice, civil—Trials; Practice, criminal, 16, 20, 21.

INSURANCE, FIRE.

1. *Insurance policy—False swearing, what will avoid.*—The false swearing, which will forfeit a claim on an insurance policy, must be either in the submission of preliminary proofs of loss, or in the examination to which, according to the terms of the policy, the assured may be subjected.—Schulter vs. Merchants' Mut. Ins. Co., 236.

2. *Insurance—False swearing of assured—Discrepancy between "proof of loss" and amount sworn to at trial—Instructions—Presumptions, etc.*—If there be a difference claimed under a policy of insurance and that sworn to by the assured himself on the trial, or established by the uncontradicted evidence on the cause, it is a question for the jury, whether, under all the circumstances, the discrepancy is the result of accident, or mistake, or fraudulent intent, of the assured. To forfeit his rights, the swearing must be not only false but fraudulent; and the discrepancy, although unexplained, will not raise the presumption that the latter is the case.

INSURANCE, FIRE, continued.

And an instruction, that if the jury found a difference between the amount of, loss sworn to in plaintiffs' proof of loss and the amount of loss proven on trial, in the absence of explanatory evidence they should find for defendant, was held bad for the above reasons, and also because the court could not declare what amount had been proved at the trial, and because such instruction might warrant the jury in finding for defendant, if they ascertained the loss proven to be in fact less than that claimed in proof of loss.—Id.

3. *Re-insurer bound by judgment against original insurer, when.*—Where judgment is rendered against the original insurer, and he has contested the suit with the advice or acquiescence, and for the benefit of, the re-insurer, the latter will be bound by the judgment, and for the costs and expenses incurred in the defense, although not made a party on the record.—Strong and Gantt The Phœnix Ins. Co., 289.

4. *Judgment—Privies not parties, bound by, when.*—Where one is bound to protect another from liability, he is bound by the result of a litigation to which such other is a party; provided, he had notice of the litigation, and opportunity to control and manage it.—Id.

5. *Re-insurer liable solely to re-insured.*—There is no privity between the one originally insured and the re-insurer; and the liability over the re-insurer is solely to the re-insured.—Id.

6. *Practice, civil—Evidence, weight of—Insurance—Burning of Property.*—Where in a suit on a policy of insurance, the defense is, that the burning of the property was due to the act of the plaintiff, the issue is to be decided, as in other civil cases, according to the preponderance of evidence and the reasonable probability of its truth. (Marshall vs. Thames Fire Ins. Co., 43 Mo., 586, and Polston vs. See, 54 Mo., 291.)—Rothschild v. The Amer. Cent. Ins. Co., 356.

7. *Practice, civil—Trial—Instructions—Commenting on Evidence.*—An instruction in a suit on a policy of insurance, where the defense was, that the plaintiff caused the burning of the property insured, which would avoid the policy, stated, that the issue was to be decided by the preponderance of evidence; the court added thereto—"regard being had, however, to the serious nature of the charge, in determining the preponderance or weight of evidence." *Held*, improper, as injecting into the case an element of criminality, which it was the object of the instruction to eliminate, and as also being a commentary on the evidence, and besides the intent of the plaintiff in causing the burning of the property was not involved in the case.—Id.

8. *Insurance—Policy, conditions of—Other insurance, notifications of—Quære* will the renewal of a policy, or the taking out of other insurance in place of that expiring, vitiate a policy in another company, which required a notification of all subsequent insurance, no notice having been given, and the property never being insured for a greater amount than was allowed in the last policy?—Id.

See Judgment, 1, 3.

INSURANCE, LIFE; See Evidence, 4, 8, 9.

INSURANCE, MARINE.

1. *Marine insurance—Sinking of barge at port—Petition—Allegations as to cause of loss—Sufficiency of.*—In an action on an insurance policy for loss of a barge with her cargo, the petition alleged an insurance against all loss "in said voyage by reason of the adventures and perils of said rivers, and all other perils," etc., and then alleged that she sprung a leak and sunk at port. *Held*, that although the loss as stated did not come within the perils of the voyage specifically insured against, it may have been caused by one of the "other perils;" and that the general allegation following the special statement of loss, that the damage arose from "one of the perils insured against" was sufficient on demurrer; that whether such was the fact was a question for the jury on the evidence, or for the court on motion for non-suit.—Gartside v. Orphans' Ben. Ins. Co. of St. Louis, 322.
2. *Insurance, marine—Sinking of boat at port—Unseaworthiness.*—The sinking of a boat at port raises a violent presumption of unseaworthiness, and this is always a defense to suit for such loss.—Id.

See Judgment, 1, 3.

INTEREST; See Administration, 13, 14, 19; Bills and Notes, 3, 4, 5, 6; Mortgages and Deeds of Trust, 11, 12; Revenue, 4.

INTERPLEA; See Attachment, 1, 2; Revenue, 4.

J.

JEOFAILS; See Practice, civil—Pleading, 11.

JUDGMENT.

1. *Re-insurer bound by judgment against original insurer, when.*—Where judgment is rendered against the original insurer, and he has contested the suit with the advice or acquiescence, and for the benefit of, the re-insurer, the latter will be bound by the judgment, and for the costs and expenses incurred in the defense, although not made a party on the record.—Strong, et al., vs. Phœnix Ins. Co., 289.
2. *Judgment—Privies not parties, bound by, when.*—Where one is bound to protect another from liability, he is bound by the result of a litigation to which such other is a party; provided, he had notice of the litigation, and opportunity to control and manage it.—Id.
3. *Re-insurer liable solely to re-insured.*—There is no privity between the one originally insured and the re-insurer; and the liability over of the re-insurer is solely to the re-insured.—Id.
4. *Judgment—Setting aside of on ground of fraud in obtaining.*—It would require a strong case to authorize the setting aside of a judgment taken by default on the ground that the same was procured through false representations.—Obermeyer vs. Einstein, et al., 341.
5. *Agent—Judgment obtained by neglect—Liability of principal.*—Mere neglect of an agent or attorney to defend a suit, will not discharge the principal from the judgment obtained, unless there was a fraudulent combination or collusion, participated in by the plaintiff.—Matthis vs. Town of Cameron, 504.
6. *Judgments—Loss or destruction—How restored—Common Law—Notice.*—Lost or destroyed judgments (prior to the legislative enactment on that subject) might be restored or proved at common law, but in every such case the opposite party should be notified.—George vs. Middough, 549.

JUDGMENT, continued

7. *Summary proceedings—Motions—Notice.*—Whenever a party's rights are to be affected by a summary proceeding or motion in court, he must be notified in order that he may appear.—Id.

8. *Judgments—Record book, destruction of—Revival—Scire facias—Nul tiel record.*—The destruction of the record book, in which the judgments are written, does not destroy the judgment debts, and though the judgments are wrongfully restored by the court without notice to the debtors, yet, when the judgments are revived by *scire facias* with notice to the debtors, then they should make their objection by plea of *nul tiel* record.—Id.

9. *Judgments—Revivals of—Executions—When outlawed—Statute, construction of.*—A judgment was obtained in 1859, was revived from time to time, the last revival being in 1867, and execution was issued in 1872. *Held*, that the execution was a nullity, being issued more than ten years after the date of the judgment (Wagn. Stat., 791, § 11), and that the lien of the *scire facias* expired before the execution issued. (Id., 790, § 4.)—Id.

The judgment being revived from time to time, the execution could rightfully issue, and that a purchaser at the sale would take title under it. PER SHERWOOD, J.—Id.

See Administration, 10, 16; Attachment, 4; Equity, 10; Justices' Courts, 1, 2, 3, 4; Mechanics' Lien, 2; Practice, civil, 3; Practice, civil—Pleading, 6, 15; Replevin, 2.

JURISDICTION.

1. *Corporations—Citizenship—U. S. Courts, removal of causes to.*—Corporations have citizenship for the purposes of suing and being sued, and are embraced in the U. S. legislation with reference to the removal of causes to its courts from State Courts.—Stanley vs. Ch., R. I. & Pac. R. R. Co., 508.

2. *Practice, civil—U. S. Courts, removal of causes—State courts, jurisdiction of, after application for removal—Amendments to pleadings.*—After an application for the removal of a cause to the U. S. court is regularly made, the State court has no further jurisdiction, and cannot allow amendments to the pleadings.—Id.

3. *Practice, civil—U. S. Courts, removal to—Application for.*—An application for the removal of a cause, which complies with the requirements of the existing law, is not invalid because it prays for the removal under laws which have been repealed.—Id.

4. *Practice, civil—Jurisdiction—Removal, application for—Trial—Other remedy—Cause, reversal of.*—By participating in the trial of a cause after the court has improperly refused an application for its removal to the United States Court, the defendant does not waive the question of jurisdiction, nor does the fact, that he might have pursued another remedy, prejudice his right to have the judgment of the lower court reversed by this court.—Id.

5. *Presumption—Courts of general jurisdiction—Acts collaterally called in question.*—Where the records of courts of general and common law jurisdiction are silent, and nothing is apparent thereon showing absence or lack of jurisdiction; jurisdiction will be presumed as a matter of law when collaterally called in question.—Huxley vs. Harrold, 516.

JURISDICTION, continued.

6. *Practice, civil—Suit where to be brought—Real estate—Statute, construction of.*—The statute (R. C. 1855, p. 1221, § 3), directing that suits affecting real estate, shall be brought in the county where the land or a part thereof is situated, refers to suits in equity, ejectment, and the like, and not to attachment suits.—Id.

7. *Practice, civil—Attachment, suit by, where to be brought—Statute, construction of.*—Under the revised code of 1855 (p. 1221, § 2; p. 244, § 20) suits by attachment could be brought in any county where the defendant had property, real or personal, and separate writs might issue to other counties in which he had property.—Id.

8. *Practice, civil—Suits where to be brought—Statute, construction of.*—The second section of the practice act (Wagn. Stat., 1005,) applies where the suit is brought against the property of the person alone, or there are no other defendants residing in the same county. The third section is intended to meet the case where the action is for the possession or there is something affecting the title.—Carter vs. Arbuthnot, et al., 582.

9. *Attachment—Suits by, where to be brought—Statute, construction of.*—In suits by attachment (Wagn. Stat., 185, § 21), if the defendants reside or have property in different counties, then separate writs may issue to every such county. Wherever a defendant resides or has property, the suit may be instituted. Either the one or the other gives jurisdiction. Jurisdiction being thus obtained, a separate writ may then issue to any co-defendant, who either resides in, or has any property in, another county.—Id.

10. *Practice, civil—Jurisdiction—Railroads—Appropriation of property—Record, what it must show.*—When superior courts are engaged in the exercise of special and limited statutory powers, their records are subject to the same rules as those of courts of special and limited jurisdiction, and in proceedings to appropriate private property for the use of a railroad, the record must show that the parties to the suit could not agree upon the compensation to be paid. (Wagn. Stat., 326, § 1.)—Kans. City, St. Jo. & C. B. R. R. Co. vs. Campbell, Nelson & Co., 585.

11. *Practice, civil—Jurisdiction—Question, when to be raised.*—The question as to the jurisdiction of the court may be raised at any time and by any party.—Id.

12. *Process—Summons, service of—Acknowledgment of—Adults—Infants—Statute, construction of.*—A summons must be served on a minor precisely as on an adult. (Wagn. Stat., 1007, § 7.) An acknowledgment in writing on the writ of the service of summons (Wagn. Stat., 1008, § 9) can only be made by adults or those capable of acting for themselves. A minor cannot do it, nor can his guardian for him. The statute relative to the appropriation of lands (Wagn. Stat., 326-7, § 1), requiring guardians to be made parties defendant, does not alter the rule as to the service of process.—Id.

13. *Summary proceedings—Property, divestiture of—Record, what must show.*—Wherever it is attempted by summary proceedings to divest the owner of his property, the record must affirmatively show, that the conditions precedent to the exercise of such extraordinary powers have been fully complied with.—Id.

See Attachment, 2; Mechanic's Lien, 1; Officers, 1, 2, 5; Practice, criminal, 1.

JURY; See Practice, civil—Trials, 6, 8; Practice, criminal, 5.

JUSTICES' COURTS.

1. *Justice's judgment—Revival by executrix—Citation—Lapse of more than ten years—Construction of statute.*—A citation for the revival of a judgment of a justice (Wagn. Stat., 830, § 5), praying that it be revived in the name of the executrix, would not authorize the justice to issue an execution on the revived judgment, more than three years having elapsed since the rendition of the judgment; the proceedings not being had with a view to revive the judgment and issue execution thereon, as provided by statute. (Wagn. Stat., 830, §§ 7 8, 9.)—Corby vs. Tracy, 511.

2. *Judgment—Courts of record—Justices—Revival—Scire facias—Limitations, statute of.*—A *scire facias* may issue to revive a justice's judgment after the lapse of ten years. The statute of limitations applies only to judgments of courts of record. (Humphreys vs. Lundy, 37 Mo., 320.)—Id.

3. *Justices' judgments—Execution—Scire facias—Transcript—Lien—Statute, construction of.*—The statute (Wagn. Stat., 830, § 6), prohibiting a party from suing out an execution on a justice's judgment more than three years after its rendition, when such judgment had not been revived, refers exclusively to the issuing of executions by justices, and has no application to proceedings on a transcript filed in the office of the clerk of the circuit court. The lien will attach from the time the transcript is filed, with like effect as upon a judgment from the date of its rendition. (Carpenter vs. King, 42 Mo., 219.)—Id.

4. *Justices' judgments—Transcript—Filed thirteen years after rendition of judgment—Status of.*—*Quære*, can an execution be issued at any time for ten years after the filing of the transcript of the judgment of a justice's court, (in this case, the transcript being filed thirteen years after the rendition of the original judgment), or must the circuit court take cognizance of the time of the original judgment?—Id.

See Execution, 1, 2.

L.

LABEL; See Good Will, 1.

LAND AND LAND TITLES.

1. *Shelley's case—Rule in, abolished in Missouri.*—Since the enactment of the statute of wills in 1825, § 18, and that respecting conveyances in 1845, § 7, the rule in Shelley's case has no longer any existence in this State. And a deed to "A.," or in trust for "A." for life, remainder over in fee simple to the heirs, creates simply a life estate in A.—Tesson vs. Newman, 198.

2. *Limitations—State statute no bar prior to issue of U. S. patent.*—Under the decision of Gibson vs. Chouteau (13 Wal., 92) possession for the period named in the State statute of limitations is no bar until the legal title passes out of the United States. (McElhinney vs. Ficke, 61 Mo., 329.)—Miller vs. Dunn, 216.

3. *Adverse possession—Right of, simply an equity—Effect of, when so pleaded.*—The right of adverse occupancy in such case was simply an equity, and if properly pleaded would bar a recovery.—Per Hough, J.—Id.

LAND AND LAND TITLES, continued.

4. *Spanish and territorial law—Ante-nuptial contract—Spanish law of "arras" —Common law.*—A conveyance of land in the territory of Louisiana, made in 1808, by an American inhabitant, in contemplation of marriage, which deed in no wise conformed to the Spanish or civil law, and contained nothing in its terms to indicate a reference to the Spanish law of *arras*, would be held to be governed by the common law, or at least so much of it as had, by positive statutes, been introduced into the territory; and, accordingly, by the statute of descents and distributions, would not be held as conveying only one-tenth part of the donor's property.—Id.

5. *New Madrid certificate—Head-right confirmation—Location of—Minutes of old board and recorder Bates—Place of record prima facie proof of location, etc., etc.*—Suit involving the title to land obtained under a new Madrid certificate developed the facts that an original application, made in 1806, to the first board of commissioners, for a head or settlement right, merely bounded the land by natural objects, and it was shown to adjoin a confirmation proved to be for land which was in the district of New Madrid in 1804. The minutes of the old board and of recorder Bates showed that the head-right confirmation was in Cape Girardeau. But a subsequent deed made in 1808, conveying the same grant, was recorded in New Madrid, and by the law then in force it could only be recorded in the district where the land was situated; and the deed itself recited that both parties resided in Cape Girardeau. The New Madrid certificate was issued for the same tract. The territorial sub-division into districts in 1804 and 1808 was not shown in evidence. *Held,* that *prima facie* the record of the deed in New Madrid districts showed that in 1808 the land was embraced therein, and this conclusion was greatly strengthened by the recital showing that while both parties resided in Cape Girardeau, they proceeded to New Madrid to procure its record; that as the New Madrid certificate could not issue for land in Cape Girardeau, the minutes of the board and of the commissioner, locating the land in Cape Girardeau, should be held to be a mistake, and that it devolved on the party so claiming to prove *aliunde*, that in point of fact the district of New Madrid did not in 1808 embrace the tract.—Id.

6. *Sheriff's sales—Purchaser—What title acquired—Recording acts.*—A purchaser on execution buys only the title of the judgment debtor, and if that title was subject to equities, it remains so in the hands of the buyer, although they may be totally unknown to him. This general proposition is much modified by the recording acts of this State. (Hill vs. Paul, 8 Mo., 480; Davis vs. Ownsby, 14 Mo., 175; Valentine vs. Havener, 26 Mo., 133.)—Mann vs. Best, 491.

7. *Conveyances—Quit-claim—What title acquired.*—A purchaser by quit-claim obtains just such title as the vendor had, and the land in his hands remains subject to the equities attaching to it in the hands of the vendor, though they may be unknown to the purchaser.—Id.

See Conveyances; Corporations, Religious, 1; Equity, 1, 2, 3, 4, 5; Mortgages and Deeds of Trust, 1, 2, 3, 4, 5; Replevin, 3; Revenue, 3; Unlawful Detainer, 1.

LANDLORD AND TENANT; See Unlawful Detainer.

LARCENY; See Practice, criminal, 17, 19.

LEGISLATURE.

1. *Legislative acts should have prospective operation.*—A prospective operation should always be given to legislative enactments, unless a different intent is clearly shown.—State ex rel vs. Ferguson, 77.
2. *Constitution—Special law, necessity of—Legislature.*—As to whether a general law can be made applicable, or whether a special act is necessary in a given case, the legislature is the exclusive judge. (See § 27 of Art. IV, of late Constitution.)—City of St. Louis vs. Shields, 247.
3. *Constitution—Taxation, rates of—Proviso allowing alteration—When goes into effect.*—The provision of the constitution, limiting the rate of taxation, does not require legislative action to enforce it, and goes into effect at once, notwithstanding the proviso allowing the rate to be increased by legislative action and a specified popular vote.—St. Jo. Bd. Pub. Schools vs. Patten, 444.
4. *Legislature—Compulsion to make laws.*—Under our system of government there is no power to compel the legislature to make laws.—Id.

See North Missouri Railroad, 1; Stock Law, 1, 2.

LICENSE; See Peddler, 1.

LIEN, MECHANIC'S; See Mechanic's Lien.

LIFE ESTATE; See Conveyances, 2.

LIMITATIONS.

1. *Statute of limitations—Disability of married women—Land descended or accrued to wife—Disseizin of—Statute begins to run as against wife, when.*—Where a title descends or accrues to a married woman, she has not a mere reversionary interest in the land consequent upon her husband's death, and a disability as to such estate till that event. During coverture the husband is not a tenant by the curtesy, but is only seized in the right of the wife. Their seizin is joint, and the statute of limitations (Wagn. Stat., 916, § 4) will begin to run against her from the joint disseizin of both. And if she fail to sue within twenty-four years after such disseizin, her right of action is barred. The fact that the husband has the power during coverture to create a particular estate, either *jure mariti*, or as tenant by the curtesy initiate, without his wife's joinder, and thus terminate her estate, has not under the above statute the effect of making her interest merely reversionary.—Valle vs. Obenhause, 81.
2. *Statute of limitation of twenty-four years—Effect of on rights of married women.*—The statute prescribing a limitation of twenty-four years (Wagn. Stat., 916, § 4) was designed to operate uniformly after a certain definite period, as a statute of absolute repose, affecting either infants, femes covert, insane persons, etc.—Per Sherwood, Judge.—Id.
3. *The statute of limitations will not begin to run against a married woman,* on account of a disseizin of her fee simple lands, occurring after the creation in her husband of a tenancy by the curtesy initiate, until the determination of such estate.—Per Hough, Judge, Dissenting.—Id.
4. *During the existence of the husband's estate by the curtesy initiate,* the wife has no right of entry, whether such estate has been conveyed by the husband, or not.—Id.
5. *The estate of a tenant by the curtesy initiate is an estate for his own life* and is held by him in his own right, and not in right of his wife; and such estate can be transferred to an adverse occupant by operation of the statute of limitations, as well as by conveyance, or sale under execution.—Id.

LIMITATIONS, continued.

6. *Limitations, statute of—Computation of time--Absence in South, flagrante bello.*—Where the maker of a note was in Louisiana, and the holder in Missouri during that period, the interval between August 16th, 1861, and August 20th, 1866, could not be computed in favor of the maker as a part of the statutory period of limitations.—McMurtry vs. Morrison, 140.

7. *Limitations, statute of—Lex fori—Lex loci contractus.*—The doctrine is firmly rooted that the statute of limitations of the country in which suit is brought, may be pleaded to bar a recovery on a contract made out of its political jurisdiction, and that the statute of the place where the contract was made, cannot be so pleaded. But when the statute of limitations where the contract is made, operates to extinguish the contract or debt itself, the case no longer falls within the rule that the statute affects only the remedy; and when such a contract is sued upon in another State, the *lex loci contractus*, and not the *lex fori* is to govern.—Id.

8. *Conflict of laws--State statutes, how construed.*—The adjudicated cases of a State relating thereto, must govern in the construction of its laws.—Id.

9. *Limitations, statute of—Suit on note—Louisiana "prescription" law not an extinguishment of debt.*—Under the laws of Louisiana, actions on bills and notes are "prescribed" in five years. But under the decisions of that State, such limitation does not operate to extinguish the debt, and suit may be brought on a note made in that State against the maker in Missouri, within the period limited by the laws of this State.—Id.

10. *Statute of limitations—Stale claims.*—Defendant may avail himself of the statute of the place of contract where the demand is stale, and he has probably been deprived of his evidence.—Id.

11. *Practice, civil—Amendments—Statute of limitations.*—Amendments are allowed expressly to save a cause from the statute of limitations, and courts have been liberal in allowing them when the cause of action is not totally different.—Lottman vs. Barnett, 159.

12. *St. Louis—Charter of* 1870—*Two years limitation applicable to special tax bills issued theretofore—Effect of, upon.*—Under the then charter of St. Louis, action on a special tax bill, issued in 1869, would not be barred for five years. It was held that the limitation of two years to suits on special tax bills contained in the charter of 1870 (Sess. Acts, 1870, p. 481, § 16), was applicable to tax bills issued theretofore, and that the owner of the bill issued in 1869 had two years after the passage of the act of 1870, and no more, within which to bring suit. After that time the tax bill ceased to be not only a lien, but an equitable charge, capable of enforcement on the property taxed. Such case presents no equities on which to found such a charge.—Seibert vs. Copp, 182.

13. *Limitations—Former remedy may be shortened, when.*—The time of enforcing a remedy may be shortened by an act of the legislature, provided the act does not operate to deprive the party of his remedy, and leaves him a reasonable time within which to sue.—Id.

14. *Special tax bills—Two years limitation not repealed by act of* 1871.—Section 7, of the Act of March 18th, 1871 (Sess. Acts 1871, p. 194), touching the collection of special tax bills in the city of St. Louis, did not repeal the provision of the act of 1870 (Adj. Sess. Acts, 1870, p. 481, § 16), limiting actions on such bills to two years.—Id.

LIMITATIONS, continued.

15. *Limitations—State statute no bar prior to issue of U. S. patent.*—Under the decision of Gibson vs. Chouteau (13 Wal., 92) possession for the period named in the State statute of limitations is no bar until the legal title passes out of the United States. (McElhinney vs. Ficke, 61 Mo., 329.)—Miller vs Dunn, 216.

16. *Adverse possession—Right of, simply an equity—Effect of, when so pleaded.*—The right of adverse occupancy in such case was simply an equity, and if properly pleaded would bar a recovery.—Per Hough, J.—Id.

17. *Equity—Stale demands—Excuses.*—Equity will not countenance the prosecution of stale demands, unless there be some attendant circumstances which will excuse the seeming laches, and palliate the apparent delay.—Wells vs. Perry, 573.

18. *Limitations, statute of—Trust, breach of—Assignment of goods—Creditors—* The statute of limitations is a good defense to a suit brought against a trustee to whom goods were assigned to be sold for the payment of debts, when there was a breach of the trust about the time of the assignment with the knowledge of the creditor, twelve years before suit brought.—Id.

See Administration, 6; Judgment, 9; Justices' Courts, 1, 2; Partnership, 4.

M.

MALICIOUS ATTACHMENT.

1. *Malicious Attachment—Malice, how shown.*—In an action for malicious attachment, express malice need not be shown. And malice may be inferred from want of probable cause. And whether the proof is sufficient to establish malice is a question for the jury under appropriate instructions.—Holliday vs. Sterling, 321.

MANDAMUS; See Revenue, 3.

MANUFACTURE; See Exclusive Rights, 1; Good Will, 1, 2.

MARRIED WOMEN; See Husband and Wife.

MASTER AND SERVANT; See Damages, 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 13, 14; Railroads, 2.

MAYOR; See Officers, 3.

MECHANICS' LIENS.

1. *Mechanics' Liens—How affected by proceedings in bankruptcy—Permission to lienor to sue obtained from U. S. court unnecessary.*—The jurisdiction of a State court to enforce a mechanic's lien, having attached, will not be divested by proceedings in bankruptcy instituted subsequently thereto. And the lienor may sue and obtain judgment and execution without an order from the United States court permitting him to prosecute his suit. And where the property is sold subject to the liens, the course for the lienor is to proceed against the property.—Seibel vs. Simeon, 255.

2. *Mechanics' liens—Effect of, as against mortgage—Judgment against owner alone—Fixtures—Question in collateral proceedings—Improvements on old house.*—Where the owner of a house had a range erected therein, which became a fixture, and afterwards gave to an outside party a deed of trust on the premises, the purchaser, under a sale of the property made to satisfy a mechanic's lien filed by the range builder, would hold the title to the house

MECHANICS' LIENS, continued.

as against a purchaser under the mortgage, although the lien was filed subsequent to the mortgage. The mechanic's lien related back to the time of commencing the work on the range, and superseded the lien of the mortgage. (Wagn. Stat., 908-9, §§ 3, 7.) And in such case the rights of the parties would not be affected by the fact that the judgment for the sum claimed on the mechanic's lien was rendered against the owner of the house alone, where its recital embraced all parties, describing their interests and providing, that if no sufficient property were found, the residue should be levied out of the premises. (Wagn. Stat., 910-11, §§ 14, 15.)

And in contest of title between the respective purchasers under the mortgage and the lien, the lien judgment could not be attacked on the ground that the range was not a fixture.

Nor was the claim of the lien purchaser impaired by the fact, that the house was four or five years old when the work on the range was done. The statute affords its protection to such cases, as well as to those where the work and materials are devoted to a building entirely new.—Reilly vs. Hudson, 383.

3. *Mechanics' liens—Prior incumbrance, sale under—Subsequent sale under the lien—Buildings—Statute, construction of.*—Land was sold under an incumbrance, and subsequently sold under a mechanic's lien for work begun subsequent to the origin of the incumbrance. *Held*, that the first sale released the land from the mechanic's lien, but that the purchaser at the execution sale under the mechanic's lien might have bought the erections and improvements free from all liens. (Wagn. Stat., 907, *et seq.*)—Crandall vs. Cooper, 478.

MISJOINDER; See Practice, civil—Pleading, 7.

MISSOURI, KANSAS AND TEXAS RAILROAD; See North Missouri Railroad.

MORTGAGES AND DEEDS OF TRUST.

1. *Trustee's deed, recitals in not prima facie evidence, when.*—In the absence of a provision therein to that effect, the recitals contained in a trustee's deed are not *prima facie* evidence of their truth. (Neilson vs. Chariton County, 60 Mo., 385.)—Vail v. Jacobs, 130.

2. *Trustee's sale in absence of trustee, void.*—The absence of a trustee at a sale under his deed of trust, is fatal, and the sale is void.—Id.

3. *Deed of trust, sale under at a sacrifice may be set aside.*—Where a trustee permits property to be sacrificed under his deed of trust, by sale for a little over a tithe of its value—as where property worth from $5,000 to $8,000 is sold for $1,000—the sale will, on timely application, be set aside.—Id.

4. *Deed of trust—Bona fides of trustee—Duties required of.*—The trustee at the trust sale should adopt all reasonable precautions to render the sale beneficial to the debtor. A bare compliance with the terms of the deed is not sufficient. And if not conducted in all fairness and integrity, the sale will be set aside. —Stoffel vs. Schroeder, 147.

5. *Mortgages and deeds of trust—Sale at unusual hour, and at sacrifice—Equitable interference.*—Where it appeared that the beneficiary in a deed of trust procured the property to be sold thereunder at eleven instead of twelve o'clock; that only two bidders were present, and that being worth $8500, it brought but $5000; *held*, that, although the inadequacy of consideration paid was not itself so unconscionable as to authorize equitable interference, and even though

MORTGAGES AND DEEDS OF TRUST, continued.

it were not shown that at the usual hour of sale the property would have brought a greater sum, yet in view of all the circumstances, the sale should be set aside.—Id.

6. *Conveyance absolute on its face, a mortgage, when—Defeasance need not be in writing.*—A conveyance intended as a security for a debt, however absolute in form, will in equity be treated as a mortgage. And to convert it into a mortgage the defeasance need not be in writing.—O'Neill vs. Capelle, 202.

7. *Conveyance—Question whether conditional sale or mortgage, how determined.*—If a conveyance is proved to be in fact a sale upon condition, and not a mortgage, the intention of the parties will be effectuated. But in case of doubt, it will be treated as a mortgage; and the continued existence after the transfer is a decisive proof that the conveyance is of the latter kind.—Id.

8. *Statute of frauds—Mortgages—Tacking verbal agreement by mortgagee as to subsequent advances.*—A verbal agreement that subsequent advances shall constitute a lien on land already conveyed as a security for former loans, is within the statute of frauds and void.—Id.

9. *Deed of trust—Debt—Presumption as to ownership.—Prima facie* a debt secured by deed of trust, belongs to the beneficiary therein named, and the presumption can only be overcome by the clearest proof.—Gimbel vs. Pignero, 240.

10. *Mortgages and deeds of trust—Notes—Contemporaneous acts, how construed.*—Where the execution of a deed of trust, and the signing and delivery of the notes therein mentioned, are contemporaneous acts, they form parts of a single transaction, and must all be read and construed together. (Brownlee vs. Arnold, 60 Mo., 79.)—Waples vs. Jones, 440.

11. *Bills and notes—Interest, when a debt.*—If, by agreement, interest on a note is to be paid annually, this constitutes a debt, if the parties make it so by their contract.—Id.

12. *Mortgages and deeds of trust—Notes—Interest due, agreement to compound—Effect of.*—By agreement in a deed of trust the interest on a note, if not paid when due, should be compounded, *Held*, this was no waiver of the right to enforce its payment when due.—Id.

13. *Mortgages—Note secured by transfer of—Release.*—The transfer of a note secured by mortgage carries the mortgage with it, unless the mortgage has been separately extinguished, as by a release for instance.—Logan vs. Smith, 455.

14. *Mortgages—Note secured by—Indorsee for value—What rights under the mortgage.*—The indorsee of a negotiable note, who takes it discharged of the equities to which it was subject in the hands of the payee, acquires the same right in a mortgage given to secure it, which the payee would have had, if no equities had ever existed against the note. (Linville vs. Savage, 58 Mo., 248, reviewed.)—Id.

15. *Administration—Mortgage—Sale by administrator—Subrogation.—Dower.*—A widow sued for dower in land sold by the administrator of her husband, out of the proceeds of which sale a judgment on a mortgage by husband and wife was satisfied, and the purchaser claimed that he should be subrogated to the rights of the mortgage. *Held*, that the purchaser could not be subrogated. (Jones vs. Bragg, 33 Mo., 337.)—Sweaney vs. Mallory, 485.

MORTGAGES AND DEEDS OF TRUST, continued.

16. *School funds, loan of—County courts—Mortgages—Statute, construction of.*—Section 22 of the act of 1855 (R. C. 1855, p. 1424) is merely directory, but where a mortgage is taken under that act for the loan of school funds, the statute must be in all respects complied with; still a mortgage taken by the county for the loan of such funds, not under the statute, but good at common law, and containing a power of sale by the mortgagee or his agent, is valid. Mann vs. Best, 491.

17. *Evidence—Res gestæ—Private entry—Certificate made at the time—Party dead.*—Notices of a sale under a mortgage were delivered by the mortgagee to a sheriff to post up, and the sheriff certified on the back of the advertisement the facts as to his posting up the notices and dated his certificate. At the time of the trial, the sheriff was dead, but a witness testified that the sheriff wrote and signed the return in his presence and on the day it bore date. *Held*, that the certificate was a private entry, but was admissible in evidence as part of the *res gestæ*.—Id.

18. *Mortgages—Sales under—Collusion between trustee and purchaser.*—A., as agent for the mortgagee, sold the land mortgaged to B., having previously agreed with B. to furnish half the purchase money and divide the profits. *Held*, that the sale was a fraud on the mortgagor and mortgagee.—Id.

19. *Chattel mortgage—Record—Possession by mortgagor—Removal of property.*—If a chattel mortgage is recorded (Wagn. Stat., 281, § 8), the mortgagee's title is not affected by the retention of the possession of the property by the mortgagor nor by his removal of it, and, if the mortgage is good here, it will be good in every State to which the property may be removed.—Feurt vs. Rowell, 524.

20. *Chattel mortgage—Record—Possession by mortgagor after condition broken.*—When a chattel mortgage is recorded, the possession of the mortgaged property by the mortgagor after condition broken is not *per se* fraudulent.—Id.

21. *Chattel mortgage—Extension of time—Neglect to enforce lien—Connivance—Rights of third parties.*—The mere extension of time by a mortgagor, or his neglect to enforce his lien under the chattel mortgage, will not destroy his rights, nothing more appearing; and there being no fraudulent connivance between mortgagor and mortgagee, and the rights of third parties not being interfered with.—Id.

See Equity, 5, 9; Mechanics' Liens, 2.

N.

NATIONAL BANKS; See Banks and Banking, 1.

NEGLIGENCE; See Common Carriers, 10; Damages, 2, 3, 5, 6, 12, 13, 14, 15; Railroads, 2

NON-RESIDENTS; See Attachment, 2.

NORTH MISSOURI RAILROAD.

1. *Corporations—Damages—North Mo. and Mo. Kans. Tex. R. R. Companies—Latter company not subject to corporation damage law.*—By its purchase, on the 5th day of February, 1872, of the property, "privileges, rights and franchises" of the North Missouri Railroad, under the act of March 24th, 1870 (Adj. Sess. Acts 1870, pp. 90, 91, § 21), The Missouri, Kansas & Texas

NORTH MISSOURI RAILROAD, continued.

Railroad assumed the obligations and liabilities imposed and obtained the rights conferred on the former company by the charter amendment of February 18th 1865, (Sess. Acts 1865, p. 89, §§ 1, 2), and was not subject to the corporation damage law. (Wagn. Stat., 310–11, § 43; See State ex rel. vs. Greene County, 54 Mo., 540.) The legislature, by the corporation law, did not attempt to repeal the charter of the North Missouri Railroad Company. Whether it had power to do so, *quære.*—Daniels vs. St. L., K. C. & N. Rly. C., 43.

NOTICE; See Attachment, 6, 7; Judgment, 6, 7, 8; Mortgages and Deeds of Trust, 17; Practice, civil—Pleadings, 17.

O.

OFFICERS.

1. *Office—Title to one not under the State—Supreme Court will not consider by certiorari.*—Under the present constitution, Art. V, § 12, neither appeal nor writ of error will lie from the Court of Appeals to the Supreme Court, where the title to an office, not under the State, is in contest; and for the same reason the title thereto cannot be examined by the Supreme Court on *certiorari.*—Britton vs. Steber, 370.
2. *Supreme Court—Original remedial writs—Jurisdiction as to, concurrent.*—In all cases where the Supreme Court is authorized to issue original remedial writs, its jurisdiction is simply concurrent, and the same matter may come up by writ of error or appeal from the lower court.—Id.
3. *Officer—Mayor not one under the State—Constitution.*—The mayor of a city is not an officer under the State within the meaning of the present constitution.—Id.
4. *State officer—Powers and functions, how derived and exercised.*—A State officer may be connected with some of the municipal functions, yet he must derive his powers from and exercise them in obedience to a State statute. And an officer elected under a municipal charter does not come within these requirements.—Id.
5. *Supreme Court—Jurisdiction—Incompetency of lower court.*—When the Supreme Court has no jurisdiction, it cannot assume it by reason of some extraneous matter, such as the incompetency of the lower court by reason of some of its members having been of counsel in the cause.—Id.

See Courts, County, 1, 2; Revenue 4; Sheriffs' Sales, 1, 2.

P.

PARTITION.

1. *Partition, judgment in, must not contravene will.*—Where, by the terms of a will the estate is vested in the executors to be sold after the death of testator's wife, and the proceeds to be divided among the children, a judgment in partition on the death of the testator, is improper. Partition cannot be made in contravention of a will.—*Ex parte* Cubbage vs. Franklin, 364.

PARTNERSHIP.

1. *Garnishment of one indebted to a partnership of which defendant in the attachment is a member—Power of court to compel partners to interplead.*—In an action by attachment against an individual, a person is not liable to garnishment who is indebted to a co-partnership of which that individual is a member. And in such a proceeding the court has no power to compel the partners to come in and litigate their interests in the fund attached.—Sheedy v. Second Nat. Bank, Garn., 17.

2. *Attachment—Garnishment of debt to a firm of which defendant is a member, how distinguishable from levy in attachment or execution.*—The garnishment in attachment of a debt owing to a firm of which defendant is a member, is distinguishable from the seizure on attachment or execution of the tangible property of a partnership, for the reason that in a sale under such seizure the property cannot be appropriated till all liens growing out of or related to the partnership are discharged, while in the case of garnishment the judgment against the garnishee, if acquiesced in, changes the right of property, and divests the co-partner's title to the property attached—which cannot be done so long as the partnership accounts remain unsettled or its debts unpaid.—Id.

3. *Garnishment—Garnishee liable for what manner of debt—Constr. Stat.—Adjustment of accounts, etc.*—The statute of garnishment (Wagn. Stat., 665, § 7) contemplates, that in order to render one liable as a garnishee, the debt which he owes defendant shall be of such a character, that upon being served with process, he may pay the amount, without being compelled to await the determination of a chancery proceeding requiring an adjustment of accounts between parties and partnerships. (Lackland vs. Garesche, 56 Mo., 267.)—Id.

4. *Partnership—Speculations outside of regular business—Assent of members—Dissolution—Settlement—Effect as to retired member—Statute of limitations.*—Although a firm embarks in a joint speculation with other parties, and outside of its regular business, a member specially authorizing the same, is bound for the partnership losses resulting therefrom, and in settlement of the firm business, his co-partners may adjust its share in the loss; and its settlement will bind him, although he may, at that time, have withdrawn from the firm. In such case the statute of limitations will not begin to run in his favor, in respect to his liability, until the date of the adjustment, and suit brought against him within five years thereafter will not be barred.—Tutt vs. Cloney, 116.

See Practice, civil—Pleading, 6.

PEDDLER.

1. *Peddlers—License—Statute, constitutionality of.*—The statute requiring a license from peddlers is unconstitutional, the decision of the United States Supreme Court being a binding authority. (Welton v. Missouri, U. S. Sup. Ct., Oct. Term 1875.)—State vs. Browning, 591.

PRACTICE, CIVIL.

1. *Practice, civil—Abatement of suits—Scire facias—Failure to bring in defendant—Affidavit—Diligence, what insufficient.*—The statute concerning the abatement and revival of suits (Wagn. Stat., 1049) is in the nature of a special statute of limitations, and after the period therein limited no writ of *scire facias* can issue. Were the law otherwise, an affidavit by counsel for plaintiff, that he heard the attorney for defendant suggest his death and ask permission to bring in his legal representative, and from a conversation with said representative he

PRACTICE, CIVIL, continued.

got the impression that he had brought in, was held an insufficient excuse for failure to take the steps on behalf of plaintiff required by the statute.—Rutherford vs. Williams, 252.

2. *Practice, civil—Abatement of suits—Suggestion of death—Exhibition of demand against administrator.*—The provision of the administration law, allowing two years within which to exhibit demands against an estate, does not render nugatory the requirement that the legal representatives of a deceased party must be brought in on or before the third term after the suggestion of his death.—Id.

3. *Practice, civil—Agreed case—Special verdict—When will stand.*—In this State an agreed case stands in lieu of a special verdict, and all the facts necessary to a determination of the case must be definitely ascertained. If there be any ambiguity, any omission of facts necessary to a recovery, any lack of clearness and certainty on material points, the judgment will not be allowed to stand.—Gage vs. Gates, 412.

4. *Summary Proceedings—Motions—Notice.*—Whenever a party's rights are to be affected by a summary proceeding or motion in court, he must be notified in order that he may appear.—George vs. Middough, 549.

See Bankruptcy, 2; Venue, change of.

PRACTICE, CIVIL—ACTIONS; See Corporations, 2; Divorce; Equity, 1, 2; Fraudulent Conveyances, 2; Jurisdiction, 6, 7; Mandamus; Replevin, Revenue, 4.

PRACTICE, CIVIL—APPEAL; See Practice, Supreme Court.

PRACTICE, CIVIL—NEW TRIALS; See Practice, Supreme Court, 1.

PRACTICE, CIVIL—PARTIES.

1. *Practice, civil—Defect of parties—Waiver of.*—Under the present practice act (Wagn. Stat., 1014, § 6; Id., p. 1015, § 10) defect of parties can only be taken advantage of by a demurrer or answer. If not, it will be considered as waived.—Gimbel vs. Pignero, 240.

See Administration, 11; Damages, 4; Husband and Wife, 6; Judgment, 1, 2, 3; Practice, civil, 1, 2; Practice, civil—Pleading, 6, 7

PRACTICE, CIVIL—PLEADING.

1. *Promissory note—Alteration putting on inquiry—Indorser not bound where alteration was subsequent to his indorsement, unless, etc.*—The indorser of a note will not be held bound by a fraudulent alteration made subsequently to his indorsement, unless through negligence the instrument has been so loosely drawn as to easily admit of alteration, and in a manner not calculated to place a man of ordinary prudence on the alert. But where no blank space was left unfilled, and the rate of interest was, after indorsement and without the knowledge of the indorser, inserted by interlineation in ink of a different color from that employed in the remainder of the note, it was held that the instrument upon its face bore such indications as should have excited suspicion and provoked inquiry; and that under such circumstances the indorser was not bound.—Capital Bank vs. Armstrong, 59.

2. *Practice, civil—Amendments—Statute of limitations.*—Amendments are allowed expressly to save a cause from the statute of limitations, and courts have been liberal in allowing them when the cause of action is not totally different.—Lottman vs. Barnett, 139.

PRACTICE, CIVIL—PLEADING, continued.

3. *Plea in abatement—Affidavit.*—An affidavit in plea in abatement sworn to by the attorney is sufficient.—Norvell vs. Porter, 309.

4. *Plea in abatement—Answer over—Effect of.*—When a plea in abatement is stricken out and the defendant duly excepts, he may afterward plead to the merits without thereby losing the benefit of his exceptions.—Id.

5. *Marine insurance—Sinking of barge at port—Petition—Allegations as to cause of loss—Sufficiency of.*—In an action on an insurance policy for loss of a barge with her cargo, the petition alleged an insurance against all loss "in said voyage by reason of the adventures and perils of said rivers, and all other perils," etc., and then alleged that she sprung a leak and sunk at port. *Held*, that although the loss as stated did not come within the perils of the voyage specifically insured against, it may have been caused by one of the "other perils;" and that the general allegation following the special statement of loss, that the damage arose from "one of the perils insured against" was sufficient on demurrer; that whether such was the fact was a question for the jury on the evidence, or for the court on motion for non-suit.—Gartside vs. The Orphans' Ben. Ins. Co. of St. Louis, 322.

6. *Practice, civil—Pleadings—Suit by firm name—When objection should be made.*—After judgment it is too late to object that plaintiffs brought suit in their firm name; if advantage is sought therefrom, it should be made by suitable motion before the trial is closed.

Qære, whether a judgment could be sustained against a firm where the individual names were not set out in the petition.—Fowler & Wild vs. Williams, 403.

7. *Practice, civil—Pleadings—Misjoinder—Demurrer—Waiver.*—A defendant, unless he demurs, will be considered to have waived the objection of misjoinder of parties.—Kellogg vs. Malin, 429.

8. *Practice, civil—Pleadings—Answer—Notes, defenses against—Agents' disobedience, ratification of.*—Where a party orders his agent at specified dates to make sales for him, and receives an account of sales from him, and subsequently gives the agent notes for the balance due on such sales, with full knowledge that his instructions had been disobeyed, he cannot, in a suit on such notes by the agent, urge as a defense thereto that his instructions were disobeyed and he was damaged thereby, and that the notes were without consideration.—Beall vs. January, 434.

9. *Practice, civil—Pleadings—Answer—Notes—False representations.*—In a suit on a note by the payee, the maker alleged that he employed the payee to make sales for him, directing him to sell when the market price would yield a profit to the maker; that the payee falsely and fraudulently represented that he had sold the goods to the best advantage, but still at a loss, and the maker relying on said representations, had made the notes to cover the loss to the payee; that in fact the representations were false, and that the goods could have been sold at a profit, and that the notes were without consideration, *held*, that this was a good defense.—Id.

10. *Practice, civil—Pleadings—Alternative defenses.*—When matter in defense is pleaded in the alternative, each alternative must, by itself, if true, constitute a defense; otherwise the plea will be bad.—Id.

PRACTICE, CIVIL—PLEADING, continued.

11. *Practice, civil—Record—Demurrer, disposal of—Jeofails, statute of.*—The record in a suit showed no formal decision of a demurrer, and no judgment thereon; the bill of exceptions showed that it was overruled and default taken for failure to answer. The demurrer was frivolous. After demurring, the defendants so doing seem to have abandoned the case. *Held*, those defendants were not damaged; that the statute of jeofails cured the defect.—Stivers v. Horne, 473.

12. *Practice, civil—Pleadings—Issues—Amendments—Reversal—Statute, construction of.*—In a suit to set aside a deed for fraud, a party was made defendant on his own motion, and by his answer and the reply an issue as to notice to him of the fraud was raised. *Held*, that an objection, that the petition did not charge notice to him, is untenable in this court. (Wagn. Stat., 1034–7, §§ 5, 6, 19, 20; Id., 1067, § 33.)—Id.

13. *Practice, civil—U. S. Courts, removal of causes—State courts, jurisdiction of, after application for removal—Amendments to pleadings.*—After an application for the removal of a cause to the U. S. court is regularly made, the State court has no further jurisdiction, and cannot allow amendments to the pleadings.—Stanley v. The Chicago, R. I. & P. R. R. Co., 508.

14. *Practice, civil—U. S. Courts, removal to Application for.*—An application for the removal of a cause, which complies with the requirements of the existing law, is not invalid because it prays for the removal under laws which have been repealed.—Id.

15. *Practice, civil—Pleadings—Demurrer—Amended petition—Motion—Final judgment.*—An amended petition was substantially the same as a prior one, to which a demurrer had been sustained, and a motion was made to strike it out, which it seems was sustained, when the court, the plaintiff declining to plead further, rendered judgment for the defendant on the demurrer theretofore sustained. *Held*, that the court could not act on the prior petition as it had been superseded by the amended one, and that judgment had not been rendered on the motion.—Hawkins v. Massie, et al., 552.

16. *Practice, civil—Pleadings—Answer—Ejectment—Swamp lands of county—Sheriff, power of, to sell revoked—Defenses.*—The answer in an ejectment suit alleged that plaintiff's deed was made by the sheriff for the land in controversy, sold by him as county swamp land after the county court had revoked his authority to sell it. (Wagn. Stat., 867, § 3.) *Held*, that this was a good defense.—Funkhouser v. Mallen, 555.

17. *Practice, civil—Pleadings—Ejectment—Answer—Plaintiff's title, denial of—Innocent purchaser for value—Allegations.*—When the answer in an ejectment suit alleges that the deed, under which plaintiff claims, is void, it is not necessary to allege that plaintiff had notice of defendant's title, nor by the omission of such allegation is it admitted that plaintiff is an innocent purchaser for value.—Id.

18. *Practice, civil—Pleadings—Allegations.*—Propositions, not contained in the allegations of the pleadings, cannot be considered.—Id.

19. *Practice, civil—Pleadings—Contract sued on not filed—How objection to be made—Statute, construction of.*—Where a pleading is founded on an instrument in writing alleged to have been executed by the other party, it must be filed with the petition, though no statement in the petition of the filing is re-

PRACTICE, CIVIL—PLEADING, continued.

quired (Wagn. Stat., 1022, § 51), unless it is alleged to be lost or destroyed. If it is not filed, the defect cannot be reached by demurrer, but by motion to dismiss, or by motion to require the party to file it. If any other reasons, than those mentioned in the statute, are given for not filing it, it is ground for demurrer.—The Hannibal & St. Joseph Railroad Co. v. Knudson, 569.

See Attachment, 1, 2, 4; Bond, 1; Damages, 4; Practice, civil–Parties, 1; Practice, civil—Trials, 10, 11, 13; Practice–Supreme Court, 4; Scire Facias, 1, 2.

PRACTICE, CIVIL—TRIALS.

1. *Instructions commenting on evidence improper.*—The court errs in giving an instruction commenting upon the evidence, *ex. g.*, selecting certain portions of it, and informing the jury that that portion has a tendency to establish a controverted point.—Capital Bank v. Armstrong, 59.

2. *Objections to testimony not stating the ground thereof.*—Objections to testimony not setting forth the grounds on which they are based, cannot be assigned for error.—Id.

3. *Practice, civil—Instructions changing issues improper.*—Courts do not possess the power to change by instructions the issues which the pleadings present.—Iron Mountain Bank of St. Louis, Mo. v. Murdock, et al., 70.

4. *Instructions singling out certain facts improper.*—An instruction is erroneous which singles out certain facts and directs a verdict, if they are found, regardless of other facts at issue.—Id.

5. *Evidence—"Falsus in uno," etc.—Testimony should not be disregarded, unless, etc.*—An instruction that the jury may disregard the testimony of a witness who has sworn falsely, concerning any material fact in issue, should not be given. They cannot reject his evidence unless they believe that he has knowingly testified to an untruth.—Id.

6. *Practice, civil—Evidence—Jury.*—In civil actions at law, questions of conflicting evidence are solely for the jury.—Tutt v. Cloney, et al., 116.

7. *Practice, civil—Admission of testimony, order of.*—The order for the admission of testimony is a matter resting very much in the discretion of the court. Evidence, inadmissible at the time without further proof, may be given if such other proof is afterwards supplied; if not, the evidence should be ruled out.—Ober v. Carson's Exec'r, 209.

8. *Practice, civil—Jury, prejudice and competency of—Questions to jurymen—Propriety of*—In suit for damages the affirmative answer of a juryman to the question, whether if the evidence were evenly balanced, he might not incline to the side of plaintiff, would not render him incompetent. (53 Mo., 525.) Such questions are improper.—Keegan v. Kavanaugh, et al., 230.

9. *Practice, civil—Trials—Jury, province of—Supreme Court.*—It is the province of the jury to determine the facts from the evidence, and of the Supreme Court to see that the instructions submitted the facts fairly to the jury.—Wyatt v. The Citizens' Rly Co., 408.

10. *Practice, civil—Trials—Common carriers, liability of—Election.*—If a petition against a common carrier states a good cause of action, it is immaterial whether it is based on the liability of the common carrier by common law, or on a special contract, and the court has no right to call on the counsel for any explanation of the petition.—Tuggle v. The St. Louis, Kansas City & N. Rly. Co., 425.

PRACTICE, CIVIL—TRIALS, continued.

11. *Evidence—Pleadings, fact admitted by.*—When a fact is admitted by the pleadings, evidence to prove it is properly excluded.—Miller v. Drake, 544.

12. *Practice, civil—Trials—Instructions—How many to be given.*—Where the instructions given, whether at the instance of the parties, or on the court's own motion, substantially cover the case, all other instructions may well be refused.—Id.

13. *Practice, civil—Trial—Separate counts—Verdict.*—Where there are several counts in a petition, but all are ignored on the trial except one, and a verdict is found on that one, such verdict is good.—Dougherty v. St. L., K. C. & N. R. R. Co., 554.

See Damages 12; Insurance, Fire, 2; Jurisdiction, 4; Practice, civil, 1, 2; Practice, civil—Pleading, 1, 18; Practice, Supreme Court, 9; Railroads, 5; Reference.

PRACTICE, CRIMINAL.

1. *St. Louis court of appeals—Appeal from in criminal cases.*—In cases of felony the State may appeal to the Supreme Court from a decision of the St. Louis Court of Appeals. The statute touching appeals of the State from the trial court (Wagn. Stat., 1114, § 14), has no application to such appeals.—State v. Reakey, 40.

2. *Indictment—Averments necessary under the practice act.*—A clear substantive charge constituting the offense set forth in an indictment, is as necessary under the present practice act as heretofore.—Id.

3. *Practice, criminal—Privilege, waiver of.*—Where a statute grants an important privilege to the prisoner, he may waive it, but, if he insists on his privilege, it must be granted.—State v. Waters, 196.

4. *Practice, criminal—Waiver of irregularity.*—If the prisoner makes no objection, he may be regarded as waiving any mere irregularity.—Id.

5. *Practice, criminal—Full panel, prisoner may insist upon, notwithstanding, etc.*—In a trial for murder defendant may waive his right to be furnished with a full panel of forty jurors from which to make his challenges, but where he insists upon the full panel, the court cannot compel him to select his triers from thirty-two jurors, although under the statute he is entitled to but twenty peremptory challenges, and the State waives its challenge of the list so reduced.—Id.

6. *Practice, criminal—Indictment—Sheriff—Embezzlement—Money and ownership, how stated—Statute, construction of.*—In an indictment against a sheriff for embezzling public money of the State and county, it is not necessary to state from whom he received the money, nor the proportion that belonged respectively to the State and county (Wagn. Stat., [1872] 459, § 41.) All that is said in the indictment, in regard to the ownership of the money, must be considered as mere amplifications of the words "public moneys," and their significance is to denote the kind of money that may be the subject of embezzlement and not its ownership. It is sufficient to allege that it was public money belonging to the State or county or both.—State v. Flint, 393.

7. *Practice, criminal—Indictment—Allegations, conjunctive or disjunctive—Repugnancy.*—When a statute enumerates the offenses, or the intent necessary to constitute the offense, disjunctively, the indictment must charge them conjunc-

PRACTICE, CRIMINAL continued.

tively, when the acts are not repugnant. If the contradictory or repugnant expressions do not enter into the substance of the offense, and the indictment would be good without them, they may be rejected as surplusage, or if simply inconsistent with a preceding averment, it may also be so rejected.—Id.

8. *Practice, criminal—Indictment—Repugnancy, when fatal.*—The charge in the indictment must not be inconsistent with itself, but no absolute rules can be laid down to determine what repugnancy will be fatal.—Id.

9. *Practice, criminal—Indictment—Court—Public moneys—Secreting—Investing—Statute, construction of.*—A charge of secreting and making away with public moneys is inconsistent with a charge of investing it in property in the sense of the statute (Wagn. Stat., [1872] 459, § 41,) and, if it is intended to arraign the accused on each, they must be inserted in different counts.—Id.

10. *Practice, criminal—Indictment—Embezzlement—Agent of State, how alleged—Statute, construction of.*—An indictment against an agent of the State and county, for embezzlement of public funds (Wagn. Stat., [1872] 459, § 41), should allege when and how he was appointed and the authority for his appointment.—Id.

11. *Practice, criminal—Indictment—Motion to quash—Objections, how stated.*—A motion to quash, or demurrer to, an indictment, shall distinctly specify the grounds of objection, or it must be disregarded, and no reason not specified shall be held to sustain such motion on demurrer. (Wagn. Stat., 1090, § 24.) A motion to quash an indictment, which only stated, that no crime against the law of the State was charged, and that the indictment did not state facts which authorized the court to put the defendant upon trial, cannot be sustained.—State v. Berry, 595.

12. *Practice, criminal—Keeping bawdy house—Indictment—Time.*—In an indictment for keeping a bawdy house, it is not necessary to specify any time. (Wagn. Stat., 1090, § 27.)—State vs. Wister, 592.

13. *Chillicothe, City of—Charter—Offenses—Bawdy houses—Exclusive jurisdiction.*—The municipal authorities of the city of Chillicothe have not exclusive jurisdiction in proceedings against the keepers of bawdy houses. (Sess. Acts 1869, p. 102, § 9.)—Id.

14. *Practice, criminal—Autre fois convict, plea of—Allegations and proof.*—A plea of *autre fois* convict must allege, and the evidence must show, that the offense, for which the defendant was convicted, is identical with that charged in the indictment.—Id.

15. *Practice, criminal—Indictment—Sunday.*—An indictment charged, that the defendant "unlawfully did labor and perform work other than the household offices of necessity, or other work of necessity or duty, on the first day of the week, commonly called Sunday, by then and there hunting game against the form of the statute," etc. *Held,* that the indictment did not pursue the language of the statute, either within the intention or scope, nor did it charge any offense against the laws of this State. (Wagn. Stat., 504, § 32.)—State vs. Carpenter, 594.

16. *Practice, criminal—Trials—Instructions to be given.*—In all criminal cases it is the duty of the court to instruct the jury as to the law; if the instructions offered are objectionable, the court should proceed to give such as the law requires.—State vs. Stonum, 597.

PRACTICE, CRIMINAL, continued.

17. *Practice, criminal—Indictment—Grand larceny—Ownership, how alleged.*—In an indictment for grand larceny, in alleging ownership of the property stolen it is not necessary to use the exact words of the statute, if words of equivalent import are employed; as, goods and chattels of one B., instead of "belonging to" B. (Wagn. Stat., 456, § 25.)—State vs. Ware, 597.

18. *Evidence—Statements—Res gestæ.*—Several armed men concealed themselves in the woods near where a horse was tied. The defendant came there on horseback, when a gun was leveled at him, and he was told to dismount and surrender himself. He did so, and said if they would wait he would tell everything. He did so, and afterwards all parties dispersed and went home. *Held*, that the statement was voluntary and was admissible in evidence as part of the *res gestæ*. But a statement, made that day to a neighbor, who invited him to stay all night with him, that he could not stay, because he had been using a mare which did not belong to him without permission; that he had tied her in the woods and must go and take her where he got her, and turn her loose there, is not a part of the *res gestæ*, and is not admissible.—Id.

19. *Crimes—Larceny—Intent.*—To constitute larceny the intention to steal must have been formed at the time of the taking.—Id.

20. *Practice, criminal—Trial—Instruction—Good character—Evidence.*—An instruction in a criminal case, that evidence of good character in connection with slight evidence, ought not to be permitted to overcome strong and positive evidence to the contrary, is not liable to the objection that it assumes the evidence outside of defendant's character to be slight.—Id.

21. *Practice, criminal—Trial—Instruction on questions not presented.*—In a criminal case an instruction should not be given where there is no evidence relating to the propositions therein contained.—Id.

See Scire Facias, 1, 2, 3.

PRACTICE, SUPREME COURT.

1. *Practice, civil—Motion for new trial—Error, what considered by Supreme Court.*—Only those errors to which the attention of the lower court was called in the motion for new trial, will be reviewed by the Supreme Court.—Lancaster, Adm'r, vs. Washington Life Ins Co. of N. Y., 121.

2. *Practice, civil—Weight of evidence.*—In civil actions at law the Supreme Court will not consider questions of conflicting evidence.—Lottman vs. Barnett, 159.

3. *Practice, Supreme Court—Bill of exceptions—Recital as to evidence—Rule VII.*—It will be presumed that a bill of exceptions contains all the evidence without a recital therein to that effect. (See rules Supreme Court, rule VII, 48 Mo.)—Peltz vs. Eichele, 171.

4. *Practice, Supreme Court—Error apparent on face of record, consideration of by—Withdrawal of demurrer—Failure to move in arrest.*—The objection that a contract sued upon is illegal and void, and constitutes no cause of action, will be entertained in the Supreme Court, although there urged for the first time. And the withdrawal of a demurrer filed on that ground, and failure to move in arrest therefor, will not preclude such objection.

For material error, apparent on the face of the record, the judgment of an inferior court will be reversed, although no exception was taken therein.—Id.

PRACTICE, SUPREME COURT, continued.

5. *Practice, Supreme Court — Decree—Conflicting evidence.* —The Supreme Court will be extremely reluctant to disturb a decree on a point of conflicting evidence.—Sharp vs. McPike, 300.

6. *Practice, Supreme Court—Case brought up a second time—What issues may be heard—Res adjudicata.*—When a case has been once decided on solemn argument in the Supreme Court, and again comes there on appeal or writ of error, generally speaking, only such questions will be noticed, as were not determined in the previous decision. Whatever had been so passed upon is *res adjudicata.*—Metropolitan Bk. vs. Taylor, 338.

7. *Practice, civil—Supreme Court—Illegal testimony—When will reverse.*—Where the evidence is conflicting, and illegal testimony is admitted, which might mislead a jury, the court might be required to send the case back for a new trial; but where there is no conflicting evidence, indeed no testimony for the appellant, it is more in accordance with the provisions of the statute (Wagn. Stat., 1067, § 33) to let the judgment stand.—Tuggle vs. St. L., K. C. & N. Rly. Co., 425.

8. *Practice, civil—Supreme Court—Bill of exceptions—Motion to quash execution.*—This court will not consider a motion to quash an execution, when it is not embodied in the bill of exceptions.—Corby vs. Tracy, 511.

9. *Practice, civil—Supreme Court—Errors of record—New trial, motion for—In arrest, motion for.*—Where the error of the trial court is patent of record, it is not necessary to move for a new trial, but the appellant has a right to have the action of the trial court reviewed on the motion in arrest of judgment.—Funkhouser vs. Mallen, 555.

See Evidence, 14; Officers, 1, 2, 5; Practice, civil—Trials, 9; Practice criminal, 1; Reference, 3.

PRESUMPTIONS; See Evidence, 1, 2, 3, 4; Execution, 2; Insurance, Fire, 2; Mortgages and Deeds of Trust, 9.

PRINCIPAL AND AGENT; See Agency.

PROCESS; See Jurisdiction, 7, 8, 9, 12.

Q.

QUIT-CLAIM DEED; See Conveyances, 11.

QUO WARRANTO; See Constitution of Missouri, 4.

R.

RAILROADS.

1. *Corporations—Damages—North Mo. and Mo., Kans. & Tex. R. R. Companies—Latter company not subject to corporation damage law.*—By its purchase, on the 5th day of February, 1872, of the property, "privileges, rights, and franchises" of the North Missouri Railroad, under the act of March 24th, 1870 (Adj. Sess. Acts 1870, pp. 90, 91, § 21), The Missouri, Kansas & Texas Railroad assumed the obligations and liabilities imposed and obtained the rights conferred on the former company by the charter amendment of February 18th, 1865 (Sess. Acts 1865, p. 89, §§ 1, 2), and was not subject to the corporation damage law. (Wagn. Stat., 310-11, § 43; See State ex rel. vs. Greene

RAILROADS, continued.

County, 54 Mo., 540.) The legislature, by the corporation law, did not attempt to repeal the charter of the North Missouri Railroad Company. Whether it had power to do so, *quære*—Daniels vs. St. L., K. C., & N. R. R. Co., 43.

2. *Railroads—Damages—Injury to a station agent—Private crossing—Employee—Negligence—Bell, failure to ring.*—A station master to whom was given the charge and management of all the freight trains within his division, and on whom the special duty devolved of keeping the track clear of obstructions, while engaged in attending to his own personal affairs, was crossing the railway less than eighty rods from a public highway, and run over and injured by one of the trains. The engineer failed to ring the bell or sound the whistle. The court intimated that the regulation as to such signals (Wagn. Stat., 310, § 38) was designed for the benefit of persons crossing at the traveled road, and not to protect one crossing by a private path, and to apply to passengers or strangers and wayfarers, and not to employees. And the court *held*, that the station master was not merely an employee of the company, but, being its agent, having superintendence of the freight trains, he could not hold the company responsible for the negligence of the engineer in failing to sound the bell or whistle; that if he was not at the time acting as such agent, he was failing in his duty, and could not make his negligence the foundation of a recovery—Evans vs. Atl. & Pac. R. R. Co., 49.

3. *Railroad machine shops, assessments on—Construction of act of March 27th 1875.*—The act of March 27th, 1875, in relation to payment of assessments on branch railroads and machine shops (Sess. Acts 1875, p. 128) does not govern cases of money collected on assessments made prior to the passage of the act; (as, where assessment was made prior thereto on machine shops in the town of Moberly).—State ex rel. vs. Ferguson, 77.

4. *Evidence—Railroads—Killing stock at crossing of public highways—Statute, construction of.*—When it is alleged that stock was killed by a train of cars, where the railroad crossed a public highway, because the bell was not rung or the whistle sounded (Wagn. Stat., 310, § 38), all the facts and circumstances must be proved, so that the jury can determine whether the killing was due to such neglect. (Stoneman vs. Atl. & Pac. R. R., 58 Mo., 503.)—Holman vs. Ch., R. I. & P. R. R. Co., 562.

5. *Practice, civil—Trials—Railroads—Injury to stock—Instructions by court—Evidence, lack of.*—Where the only proof in a suit against a railroad for killing stock at a public crossing is the death of the animal, and the failure of the railroad to ring the bell or sound the whistle, it is the duty of the court to declare as a matter of law that the plaintiff cannot recover. (Owens vs. Hann. & St. Jo. R. R., 58 Mo., 386; Howenstein vs. Pac. R. R., 55 Mo., 33, considered.)—Id.

6. *Practice civil—Jurisdiction—Railroads—Appropriation of property—Record, what it must show.*—When superior courts are engaged in the exercise of special and limited statutory powers, their records are subject to the same rules as those of courts of special and limited jurisdiction, and in proceedings to appropriate private property for the use of a railroad, the record must show that the parties to the suit could not agree upon the compensation to be paid. (Wagn. Stat., 326, § 1.)—K. C., St. J. & C. B. R. R. Co. vs. Campbell, Nelson & Co., 585.

RAILROADS, continued.

7. *Railroads—Lands, condemnation of—Commissioners, report of, when set aside.*—Ordinarily, where opinions as to the value of the land might well be variant, the reports of commissioners, appointed to assess the land condemned for a railroad, will not be closely scrutinized; but the court will interfere where the damages assessed are flagrantly excessive; where there are manifest indications of an entire lack of appreciation of the duties and responsibilities of their position, and an utter obliviousness of the rudimentary principles of fairness and impartiality.—Id.

See Common Carriers; Conveyances, 12. 16; Eminent Domain, 2; Evidence, 12.

RECITALS; See Mortgages and Deeds of Trust, 1.

RECOGNIZANCE; See Scire Facias, 1, 2, 3.

RECORD; See Attachment, 6; Evidence, 10; Judgment, 6, 8; Jurisdiction, 5, 10, 13; Land and Land Titles, 6; Mortgages and Deeds of Trust, 19, 20; Practice, civil—Pleading, 11; Practice, Supreme Court, 9; Scire Facias, 1, 2; Sheriffs' Sales, 3.

REFERENCE.

1. *Referee—Finding of, set aside and different one entered on the evidence, proper.*—The court may set aside the finding of a referee, and, on the facts as presented by his report, find a different result and enter up a decree accordingly.—O'Neill vs. Capelle, 202.

2. *Case referred back to try particular issue—Evidence, what should be heard.*—Where a case, theretofore submitted to a referee for a trial of all the issues, is referred back to him to take additional testimony pertinent to a particular issue, he will exceed his powers in hearing evidence on other points.—Id.

3. *Referee—Report of, equivalent to special verdict—Finding of fact in chancery proceedings.*—The report of a referee stands as the verdict of a jury, and where there is any evidence to sustain it, the Supreme Court will adopt the same rule as to interference with his finding of facts. And even where the proceeding is in chancery, while this court has the right to weigh the testimony, if it be oral, the determination of questions of fact will be left in great measure to his discretion.—Gimbel vs. Pignero, 240.

REPLEVIN.

1. *Replevin on executory agreement will not lie.*—Where there is only an agreement to sell, and the sale is not executed, an action for the possession cannot be maintained. The proper remedy in such case would be an action for damages arising out of the breach of the contract.—Boutell vs. Warne, 350.

2. *Replevin—Verdict for defendant—Judgment for full value, when improper—Rights of parties, how adjusted.*—In replevin, based on a claim of purchase, where the jury find the right of possession to be in defendant, and it appears that plaintiff paid part of the consideration, judgment for defendant for the full value of the property is improper. It should be for the amount to which defendant would be entitled in view of all the facts of the case (such as instalments of purchase money, received by him, etc). The statute touching claim and delivery of property was intended to make a complete and satisfactory adjustment in that action of all the rights of the parties.—Id.

REPLEVIN, continued.

3. *Replevin—Land deeded in part consideration for goods—Cure in title after suit brought, proof of, admissible, when.*—In replevin for goods, for the purchase of which land had been deeded as part of the consideration, and it appeared that there was a slight defect in the title which was removed after suit brought, but before the trial, *held*, that evidence of such reform of title was competent.—Id.

4. *Replevin—Consignment—Agent—Assignment—Advances.*—Pursuant to an agreement made with a view to the purchase of certain hogsheads of tobacco, they were shipped by A., to B., a commission merchant in St. Louis, to hold the same as his agents but without any charge, and to be delivered to the buyer, C., on and not before payment by him to B. of the purchase price, together with freight and all charges. To this arrangement B. and C. both agreed, and C. received and paid for part of the hogsheads, but refused to take the remainder. And A., learning this fact, demanded the tobacco from B., but was informed that he had made an assignment under the State law, and it appeared that the tobacco had been turned over to D. a warehouseman; that the warehouse receipt given by him to B., had been delivered to the assignee. A. then tendered to D. all charges due him for storage. It also appeared that B. had made to A. sundry advances on the tobacco, being more than the amount received by C. In replevin against D. for the tobacco, the court held; 1st, that B. had no lien on the tobacco: that the payment of freight was an advancement to C. and not to A.; that B., not being the agent of A. for the sale of the tobacco, was not entitled to be reimbursed out of the tobacco for advancements; that the receipts gave D. no claim to the property as against A.—Jones vs. Evans, 375.

5. *Sale of personal property—Oats to be threshed and measured—Delivery—When title passed—Confusion of goods—Replevin.*—Oats were purchased and paid for, which were then in stacks, but were to be threshed and measured by the vendor, and then and there delivered to the purchaser, who was to furnish sacks for them, and if he did not furnish enough sacks the balance were to be stored by the vendor. *Held*, that the title passed when the oats were threshed and measured, and the fact that the vendor mixed the oats, for which no sacks were provided, with his own oats, did not divest the title of the purchaser, but that he might have maintained replevin therefor.—Groff vs. Belche, 400.

RES ADJUDICATA; See Peddler, 1; Practice, Supreme Court, 6.

RES GESTÆ; See Mortgages and Deeds of Trust, 17; Practice, criminal, 18.

RESTRAINT OF TRADE; See Contracts, 1, 2; Peddler, 1.

REVENUE.

1. *Revenue—Act of 1860, exempting Southern Hotel property from taxation—What taxes exempted by—Assessment—Taxation.*—By the act of January 4th, 1860, the lot for the Southern Hotel in the city of St. Louis, was declared to be "exempted from taxation by the city and county, for the period of ten years, from and after the first day of December, 1859." Prior to that date taxes had been assessed against this property for the year 1860, but the return in the tax books showed that they had not been paid, but were marked "exempted by the act of January 4th, 1860, from railroad, school and county taxes." The assessment for 1860 was begun October 1st, 1859, and completed by March 1st, 1860. *Held*, that the word "taxation," used in the act, referred to

REVENUE, continued.

taxes which were due and subject to levy in 1860, and not merely to those which should be assessed for that year; that the discharge entered on the tax book was conclusive evidence that the tax for 1860 was not collected; and that, as the exemption was to be for only ten years, the property was liable for the taxes assessed in 1869, and due in 1870. That the assessment constituted a lien, does not affect the proposition.—Southern Hotel Co. vs. County Ct. of St. Louis Co., 134.

2. *Assessment for local benefits—Valid exercise of taxing power.*—Assessments made for benefits conferred by local improvements are a valid exercise of the taxing power.—State ex rel vs. City of St. Louis, 244.

3. *Revenue—Tax deed—Rights of purchaser at, how determined—Gen. Stat. of 1865, tax sale under—Recitals in tax deed—Mandamus.*—Where land was assessed and taxed under the statute law of 1865, the rights of a purchaser thereof, at tax sale, must be determined by that law. And under the statute of 1865 (p. 127, § 110), the collector was not required to give the purchaser any particular form of deed, or embody in it any particular recitals, and mandamus would not lie for that purpose; and if it did, such recitals would amount to nothing in the way of evidence.

The collector's deed must show the facts authorizing a sale, but it has not been decided that a failure of the deed to correctly recite all the facts will avoid the deed.—State ex rel vs. Mantz, 258.

4. *Revenue—Tax bills on personalty under statute of 1865—Interest on, extortion—Action against collector—Claim of county court—Principal and agent.*—Under the statute of 1865 (Gen. Stat. 1865, p. 122, §§ 84, 51 and 26), delinquent tax bills on personalty did not bear interest, and when the collector received the same and retained it long after his term of office expired, he was held guilty of extortion, regardless of his motives. And it was held further, that where the party taxed made vain application for abatement of the interest, and paid it under fear and threat of levy by the collector, an action would lie for the interest so obtained. And in such state of facts, on interpleader in the circuit court between the party having paid the same and the county court, the latter can have no claim at law or in equity. It could not be claimed, as between himself and the tax payer, that the collector was agent of the county, and that payment to him was in effect payment to the county, for such relation only applies to lawful transactions.—Maguire vs. State Sav. Ass'n, 344.

5. *Constitution—Taxation, rates of—Proviso allowing alteration—When goes into effect.*—The provision of the constitution limiting the rate of taxation, does not require the legislative action to enforce it, and goes into effect at once, notwithstanding the proviso allowing the rate to be increased by legislative action and a specified popular vote.—St. Jo. Bd. Pub. Schools vs. Patten, 444.

6. *Injunction—Illegal taxation—Who can injoin.*—To prevent illegal action on the part of municipalities, tending to increased taxation, the State, through the Attorney General or Circuit Attorney, or any tax payer of the municipality, may institute a proceeding for an injunction.—Matthis vs. Inhab. of the Town of Cameron, 504.

See Peddler, 1; Sales, 3; Special Taxes.

S.

ST. LOUIS CIRCUIT COURT; See Sheriff's Sales, 2.

ST. LOUIS, CITY OF; See Limitations, 12, 13, 14; Corporations, Municipal, 1, 2.

ST. LOUIS COURT OF APPEALS.

1. *St. Louis court of appeals—Appeal from in criminal cases.*—In cases of felony the State may appeal to the Supreme Court from a decision of the St. Louis Court of Appeals. The statute touching appeals of the State from the trial court (Wagn. Stat., 1114, § 14), has no application to such appeals.—State vs. Reakey, 40.

SALES.

1. *Sale—What acts necessary to complete intention of parties—What should be shown.*—Where anything remains to be done between the seller and the purchaser, before the goods are to be delivered, as separating the specific quantity sold from a large mass, or identifying them when mixed with others, a present right of property does not rest in the purchaser. But when a mere operation of weight, measurement, counting, or the like, remains to be performed after the goods are actually delivered, and it is shown that it was the intention of the parties to complete the sale by delivery, such weighing, measuring or counting will not be regarded as a part of the contract of sale, but will be considered as referring to the adjustment on a final settlement. In such case it is to be ascertained whether the acts and negotiations of the contracting parties show the intention of the seller to relinquish all further claim as owner, and that of the buyer to assume such control with all liabilities.—Ober vs. Carson's Ex'r, 209.

2. *Custom—What essential to constitute, when will control—Cannot change the law.*—A custom, in order to control, must be certain, settled and uniform, and not of a character such as to alter the rights and liabilities of parties as fixed by law. Custom cannot change or do away with the requirements of law touching the delivery of personal property.—Id.

3. *Cotton, tax on—Act of congress touching liens, permits for delivery of bales, etc.—Transfer of title and possession subject to.*—The act of congress of July 1st, 1862, and the regulations of the treasury department made pursuant thereto, under which the tax on cotton became a lien, and the collector was instructed to mark the bales on which the tax was paid, and then issue permits for their removal, did not prevent a transfer from one owner to another, before the tax was paid. They might notwithstanding contract, subject to such regulations, for a change of ownership and possession of the property.—Id.

4. *Sale of personal property—Oats to be threshed and measured—Delivery—When title passed—Confusion of goods—Replevin.*—Oats were purchased and paid for, which were then in stacks, but were to be threshed and measured by the vendor, and then and there delivered to the purchaser, who was to furnish sacks for them, and if he did not furnish enough sacks the balance were to be stored by the vendor. *Held*, that the title passed when the oats were threshed and measured, and the fact that the vendor mixed the oats for which no sacks were provided, with his own oats, did not divest the title of the purchaser, but that he might have maintained replevin therefor.—Groff vs. Belche, 400.

See Agency, 4; Bills and Notes, 8, 9; Contracts, 2; Mortgages and Deeds of Trust, 1, 2, 3, 4, 5; Sheriffs' Sales.

SCHOOLS AND SCHOOL LANDS; See Mortgages and Deeds of Trust, 16.

SCIRE FACIAS.

1. *Scire facias—Recognizance—Record—Errors—Demurrer.*—A *scire facias* on a recognizance is merely a continuation of an existing proceeding to enforce the collection of a debt confessed, and if enough appears from the record and files of the court to entitle the State to execution, any errors or omissions in the writ will be disregarded on demurrer to the writ.—State vs. Heed, 559.

2. *Scire facias—Demurrer—Recognizance, crime not stated in—Record.*—A demurrer to a *scire facias*, that the recognizance did not state the crime of which the defendant was convicted, is bad, where the title of the original cause is therein stated, and the record of the cause shows the crime, and the recognizance is conditioned according to law, and was properly entered into.—Id.

3. *Recognizance to abide appeal—Remanding cause—Circuit court, order of, o defendant to appear for new trial.*—When a defendant enters into a recognizance for an appeal, upon reversal of the cause in the higher court it is his duty to appear for a new trial without further order on him from the trial court to that effect.—Id.

See Judgment, 6, 8, 9; Justices' Courts, 1, 2, 3.

SEPARATE ESTATE; See Husband and Wife, 7, 8, 9, 10.

SHELLEY'S CASE, RULE IN; See Conveyances, 2.

SHERIFF; See Courts, County; Practice, civil—Pleading, 16; Practice, criminal, 6; Sheriffs' Sales.

SHERIFFS' SALES.

1. *Sheriffs' sales—Inadequacy of consideration—Irregularities, as to strangers, as to privies.*—Inadequacy of price as a ground for setting aside a sheriff's sale, after the rights of innocent third parties have intervened, is not favorably regarded by the courts. But as to parties affected with knowledge of the facts, infirmities and irregularities connected with the sale, such as inadequacy of consideration, failure of the sheriff's report to show sale during a session of the circuit court and the like, are considered in a different light, as ground for equitable relief.—Ex parte Cubbage v. Franklin, 364.

2. *Sheriff's report of sale, exceptions to—Rule of St. Louis circuit court, to what does not apply.*—Rule forty-four of the St. Louis circuit court, providing that, unless exceptions to a sheriff's report of sale are made within three days, the same shall stand confirmed, has no application to a case where irregularities are apparent on the face of the sheriff's return.—Id.

3. *Sheriff's Sales—Purchaser—What title acquired—Recording acts.*—A purchaser on execution buys only the title of the judgment debtor, and if that title was subject to equities, it remains so in the hands of the buyer, although they may be totally unknown to him. This general proposition is much modified by the recording acts of this State. (Hill vs. Paul, 8 Mo. 480; Davis vs. Ownsby, 14 Mo. 175; Valentine vs. Havener, 26 Mo. 133.)—Mann vs. Best, 491.

4. *Sheriff's deed—Acknowledgment of, before the judge.*—The acknowledgment of a sheriff's deed is good which states "on the —— day before the Judge of the circuit court within and for the —— county aforesaid, in court judicially sitting, appeared," etc. (McClure vs. McClurg, 53 Mo. 173.)—Huxley v. Harrold, 516.

SHERIFFS' SALES, continued.

5. *Attachment—Execution, sale under—What title passes.*—A sale under an execution on a suit brought by attachment conveys the title of the debtor, legal or equitable, to the land, discharged of all incumbrances created by him subsequent to the levy of the writ of attachment. (Wagn. Stat., 184, § 18; Lackey vs. Seibert, *supra;* Ensworth vs. King, 50 Mo. 477.)—Id.

See Execution, 1, 2; Unlawful Detainer, 1.

SOUTHERN HOTEL CO.; See Revenue, 1.

STATUTE, CONSTRUCTION OF.

1. *Legislative acts should have prospective operation.*—A prospective operation should always be given to legislative enactments, unless a different intent is clearly shown.—State ex rel vs. Ferguson, 77.

See Administration, 2, (Wagn. Stat., 97, § 25) 7, (Wagn. Stat., 87, § 32; id., 110, § 18; id., 84, §§ 2, 3,) 8, (Wagn. Stat., 81, § 67,) 13, (Wagn. Stat., 90, §§ 54, 55).

Attachment, 5, (Wagn. Stat., 665, § 7) 6, (Sess. Acts 1863–4, p. 7) 8, (Wagn. Stat., 189, § 40) 9, (Wagn. Stat., 184, § 18) 10, (R. C. 1855, 1221, § 3) 11, (R. C. 1855, 1221, § 2; id., 244, § 20).

Bankruptcy, 2, (U. S. Bankrupt Act, 1867, §§ 39, 40).

Banks and Banking, (Rev. Stat. U. S., 998, §§ 5136, 5137).

Constitution of Missouri, 1, (Const. 1865, Art. IV, § 27) 2, (Const. 1865, Art., VIII, §§ 4, 5) 3, (Adj. Sess. Acts 1872, 466).

Conveyances, 2, (Statute of Wills, 1825, § 18; Stat. of Conveyances, 1845, § 7).

Corporations, Religious, 1, (Wagn. Stat., 1872, 339, § 2).

Divorce, 1, (Wagn. Stat., 1041, § 16; id., 333–4, § 3).

Election, 1, (Wagn. Stat., 578, § 34) 2, (Wagn. Stat., 566, § 15).

Equity, 4, (Wagn. Stat., 605, § 16).

Evidence, 13, (Wagn. Stat., 1067, § 33).

Garnishment, 1, (Wagn. Stat., 186, § 23, subd. IV; id., 666, § 13).

Homestead, 1, (Wagn. Stat., 697, § 1).

Husband and Wife, 1, 2, (Wagn. Stat., 916, § 4).

Judgment, 9, (Wagn Stat., 791, § 11; id., 790, § 4).

Jurisdiction, 6, (R. C. 1855, 1221, § 3) 7, (R. C. 1855, 1221, § 2; id., 244, § 20) 8, (Wagn. Stat., 1005, § 2) 9, (Wagn. Stat., 185, § 21) 10, (Wagn. Stat., 326, § 1) 12, (Wagn. Stat., 1007, § 7; id., 1008, § 9; id., 326–7, § 1.)

Justices' Courts, 1, (Wagn. Stat., 830, §§ 5, 7, 8, 9) 3, (Wagn. Stat., 830, § 6).

Land and Land Titles, 1, (Statute of Wills, 1825, § 18; Stat. Conveyances, 1845, § 7).

Legislature, 2, (Const. 1865, Art. IV, § 27).

Limitations, 1, 2, (Wagn. Stat., 916, § 4) 12, (Sess. Acts, 1870, 481, § 16) 14, (Sess. Acts, 1871, 194, § 7; Adj. Sess. Acts 1870, 481, § 16.)

Mechanic's Lien, 2, (Wagn. Stat., 908–9, §§ 3, 7; id., 910–11, §§ 14, 15) 3, (Wagn. Stat., 907 *et seq*).

Mortgages and Deeds of Trust, 16, (R. C. 1855, 1424, § 22) 19, (Wagn. Stat., 281, § 8).

STATUTE, CONSTRUCTION OF, continued.
North Mo. R. R., 1, (Adj. Sess. Acts, 1870, 90–1, § 21; Sess. Acts 1865, 89, §§ 1, 2; Wagn. Stat., 310–11, § 43).
Officers, 1, (Const. 1875, Art. V, § 2).
Partnership, 3, (Wagn. Stat., 665, § 7).
Practice, civil, 1, (Wagn. Stat., 1049).
Practice, civil—Parties, 1, (Wagn. Stat., 1014, § 6; id., 1015, § 10).
Practice, civil—Pleading, 12, (Wagn. Stat., 1034, §§ 5, 6, 19, 20; id., 1067, § 33) 16, (Wagn. Stat., 867, § 3) 19, (Wagn. Stat., 1022, § 51).
Practice, Criminal, 1, (Wagn. Stat., 1114, § 14) 6, 9, 10, (Wagn. Stat., 459, § 41) 11, (Wagn. Stat., 1010, § 24) 12, (Wagn. Stat., 1090, § 27) 13, (Sess. Acts 1869, 102, § 9) 15, (Wagn. Stat., 504, § 32).
Practice, Supreme Court, 7, (Wagn. Stat., 1067, § 33).
Railroad, 2, (Wagn. Stat., 310, § 38) 3, (Sess. Acts 1875, p. 128) 4, (Wagn. Stat., 310, § 38) 6, (Wagn. Stat., 326, § 1).
Revenue, 3, (Gen. Stat., 1865, 127, § 10) 4, (Gen. Stat. 1865, 122, §§ 26, 51, 84).
St. Louis, City of, 1, (Sess. Acts 1870, 481, § 16) 3, (Sess Acts, 1871, 194, § 7; Adj. Sess. Acts 1870, p. 481, § 16).
St. Louis Court of Appeals, 1, (Wagn. Stat., 1114, § 14).
Sheriffs' Sales, 5, (Wagn. Stat., 184, § 18).
Stock Law, 2, (Sess. Acts 1873, p. 70; Adj. Sess. Acts 1874, p. 289).
Unlawful Detainer, 1, (Wagn. Stat., 880, § 15).
STOCK LAW.
1. *Legislation, delegation of to popular vote.*—It is now the established doctrine that statutes creating municipal corporations, or imposing liabilities upon them, or authorizing them to incur obligations or make improvements may be referred to the people of the districts immediately affected to decide by their votes whether they will accept the incorporation or assume the burdens. But the legislature must enact a complete and valid law according to the prescribed usages. And it must derive its whole vigor and vitality from the legislature, and no additional efficacy from the popular vote.—Lammert vs. Lidwell, 188.
2. *Restraint of animals—Acts concerning a delegation of the law making power are unconstitutional.*—The act of March 20th, 1373 (Sess. Acts 1873, p. 70), was by its title declared to be "an act to prevent domestic animals from running at large in those counties which, by a majority vote, may decide to agree thereto," and the act provided, that if, on a submission to popular vote, a majority favored their restraint, it should be unlawful for animals to run at large; and it prohibits the county court from ordering a special election determining the adoption of the law, more than once a year. It was held, that the act had no existence without the special election; that it was a delegation to the people of the law making power, and unconstitutional.
And the similar act of 1874, applicable to St. Louis county (Adj. Sess. Acts 1874, p. 239) was held amenable to the same objection.—Id.
STOCK, TRANSPORTATION OF; See Common Carriers, 2, 9, 10.
STOCK, KILLING OF; See Railroads, 4, 5.
SPANISH LAW; See Land and Land Titles, 4.

LAW LIBRARY OF University of MICHIGAN.

SPECIAL LEGISLATION; See Constitution of Missouri, 1, 2, 3.
SPECIAL TAXES; See St. Louis, City of, 1, 2, 3.
SPECIFIC PERFORMANCE; See Equity, 1.
SUNDAY; See Practice, criminal, 1, 5.
SURETIES; See Administration, 8; Equity, 10.
SWAMP LAND; See Practice, civil—Pleading, 16.

T.

TAXES; See Revenue.
TAXATION; See St. Louis, City of, 1, 2, 3; Special Taxes.
TRADE MARK; See Good Will, 1, 2.
TRANSCRIPT; See Execution, 1, 2; Justices' Courts, 3, 4.
TRUSTS AND TRUSTEES; See Conveyances, 2; Equity, 2; Limitations, 16; Mortgages and Deeds of Trust.

U.

UNDUE INFLUENCE; See Conveyances, 5; Equity, 3, 9; Wills, 1.
UNLAWFUL DETAINER.
1. *Unlawful detainer—Equitable title, voluntary sale of—Sheriff's deed—Relation—Tenant, attornment by.*—A., having an equitable title to land, sold the land to B., and subsequently, as B.'s agent, leased the land to C. Afterwards the land was attached as A.'s and was, on execution in that suit, sold by the sheriff. The purchaser demanded that C. attorn to him, but C. surrendered the property to D. as B.'s agent, who let the land to the defendant. *Held*, on suit by the purchaser against the tenant for unlawful detainer, that the doctrine of relation did not apply, and that neither C. nor the defendant could properly attorn to the plaintiff. (Wagn. Stat., 880, § 15.)—Clampitt vs. Kelley, 571.

V.

VERDICT; See Practice, civil, 3; Practice, civil—Trials, 15.
VENUE, CHANGE OF.
1. *Practice, civil—Change of venue—Affidavit.*—In civil cases an application for change of venue, not verified by the oath of the party, should be overruled.—Norvell vs. Porter, 309.

W.

WAIVER; See Jurisdiction, 4; Practice, civil—Parties, 1; Practice, civil—Pleading, 7; Practice, criminal, 3, 4, 5.
WARRANTS, TOWN; See Bills and Notes, 13.

WILLS.

1. *Will—Undue influence—Mental capacity.*—In suit to set aside a will on the ground of mental incapacity, undue influence, etc. *Held*, 1st, that the fact that at the date of testator's marriage, he was sixty-eight and his wife but eighteen years of age was not *per se* proof of his insanity or imbecility; 2nd, that evidence touching the wife's reputation for chastity was inadmissible; 3rd, that a sore leg was not such an infirmity, as would disqualify him from making his will; 4th, that inequality in the distribution of the estate might be a circumstance going to show undue influence, but nothing more; 5th, that the statement of the testator, that the will was written for him by a lawyer, was a sufficient assertion that he understood its contents.—Thomas vs. Stump, 275.

See Conveyances, 2; Partition, 1.

WITNESSES.

1. *Witnesses—Deceased party, contract with.*—In a suit against C. by A. for himself, and as administrator of B., C. is inadmissible as a witness to prove that he settled the matter in controversy with B. during his life time.—Kellogg vs. Malin, 429.

See Practice, civil—Trials, 5.